DOCKET

No. 86-1431-CFX Title: Theodore J. Loeffler, Petitioner
Status: GRANTED v.
Preston R. Tisch, Postmaster General of the United States

Docketed:
March 5, 1987 Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Van Amburg,Lisa S.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 5 1987	G	Petition for writ of certiorari filed.
3	Apr 6 1987		Order extending time to file response to petition until May 8, 1987.
5	May 11 1987		Order extending time to file response to petition until May 29, 1987.
6	Jun 2 1987		DISTRIBUTED. June 18, 1987
7	Jun 3 1987	X	Brief of respondent Tisch, Postmaster General (TBP) in opposition filed.
8	Jun 12 1987	X	Memorandum of respondent Tisch, Postmaster General filed.
9	Jun 22 1987		Petition GRANTED.
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11	Jul 17 1987		Order extending time to file brief of petitioner on the merits until August 20, 1987.
13	Aug 14 1987		Record filed.
12	Aug 15 1987		USDC transcript of proceedings received.
14	Aug 20 1987		Brief of petitioner Theodore J. Loeffler filed.
15	Aug 20 1987		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
16	Sep 10 1987	G	Motion of petitioner to dispense with printing the joint appendix filed.
18	Sep 24 1987		Order extending time to file brief of respondent on the merits until October 8, 1987.
19	Oct 5 1987		Motion of petitioner to dispense with printing the joint appendix GRANTED.
20	Oct 8 1987		Brief of respondent Tisch, Postmaster General filed.
21	Nov 20 1987		CIRCULATED.
22	Nov 23 1987		SET FOR ARGUMENT. Monday, January 11, 1988. (2nd case).
23	Dec 30 1987	X	Reply brief of petitioner Theodore J. Loeffler filed.
24	Jan 11 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 - 1431

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THEODORE J. LOEFFLER,
Petitioner,

vs.

PRESTON R. TISCH, POSTMASTER GENERAL
OF THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Postal Service, created by an act of Congress in 1970 and therein authorized "to sue and be sued," 39 U.S.C. 401(1), is immunized against an award of pre-judgment interest in a suit brought pursuant to the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e, *et seq.*

LIST OF PARTIES

The parties to this proceeding are the petitioner, Theodore J. Loeffler, and the respondent Preston R. Tisch, in his official capacity as Postmaster General of the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Theodore J. Loeffler, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit (En Banc) entered in the above-captioned proceeding on December 8, 1986.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit En Banc is as yet unreported but is reprinted in the Appendix hereto at page A-1.

The three-judge panel opinion preceding the En Banc decision below is reported at 780 F.2d. 1365 (8th Cir. 1985) and is reprinted in the Appendix hereto at page A-12.

The opinion of the United States District Court for the Eastern District of Missouri is unreported but is reprinted in the Appendix hereto at page A-26.

JURISDICTION

On December 8, 1986, the United States Court of Appeals for the Eighth Circuit issued its order affirming the District Court's judgment denying prejudgment interest.

Jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1) and 2101(c).

STATUTE INVOLVED

The Postal Reorganization Act of 1970 provides in relevant part, as follows at 39 U.S.C. 401(1):

> The Postal Service shall have the following general powers:
>
> 1. To sue and be sued in its official name;. . . . ."

STATEMENT OF THE CASE

Petitioner Loeffler is a male rural carrier who prevailed in the district court on his claim of reverse sex discrimination against the United States Postal Service under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16. The district court found that the Postal Service unlawfully discharged him because of his sex, ostensibly for conduct which female rural carriers openly engaged in without suffering like discipline.

The court awarded Loeffler reinstatement, back pay of $91,871.00, attorney's fees and expenses but denied him prejudgment interest on his back pay, holding that the Postal Service was shielded by the cloak of sovereign immunity from an award of prejudgment interest under Title VII.

A panel of the United States Court of Appeals for the Eighth Circuit upheld the denial of prejudgment interest on the basis of

sovereign immunity. Thereafter, a Rehearing En Banc was granted and the Court of Appeals, in a 6 to 5 opinion, affirmed the denial of prejudgment interest. The Court En Banc reasoned that, when the Postal Reorganization Act was passed in 1970, creating the Postal Service and subjecting it to a "sue and be sued" clause, sovereign immunity was waived. However the waiver did not reach Title VII, because in 1970, Title VII did not extend to federal instrumentalities, including the Postal Service. Later, in 1972, when Congress amended Title VII to reach the federal government, it did not directly speak to the question of interest. Therefore, the court reasoned, immunity remains in effect to bar interest awards.

REASONS FOR GRANTING THE WRIT

In *Library of Congress v. Shaw,* ____ U.S. ____, 106 S.Ct. 2957 (1986), the Court recently held that Congress in its 1972 amendments to Title VII, did not waive the Government's immunity from interest. The Court cited the rule that, absent express congressional consent waiving sovereign immunity, interest cannot be awarded against the Government. *Id.* at 2961.

However, in footnote 5 of the *Shaw* opinion, the Court stated that the requirement of an express waiver of sovereign immunity as to interest is "*inapplicable where the Government has cast off the cloak of sovereign immunity and assumed the status of a private commercial enterprise. See, e.g., Standard Oil Co. v. United States,* 267 U.S. 76, 79 (1925)." 106 S.Ct. at 2963 n.9 (emphasis added). The Court in *Shaw* left unresolved, however, the question of whether or not the Postal Service, created in 1970 by the Postal Reorganization Act and therein authorized "to sue and be sued," is the kind of "private commercial enterprise" referred to at footnote 5.

This case directly presents that issue left unresolved by *Shaw:* Whether or not the Postal Service is immune from prejudgment interest awards under Title VII. By accepting certiorari, the Court can lay to rest a nagging and recurrent debate within the federal court system.

On the issue of prejudgment interest under Title VII, the decision below squarely and openly conflicts with *Nagy v. United States Postal Service,* 773 F.2d 1190 (11th Cir. 1985). In addition, two other circuits have held that the "sue or be sued" clause waives sovereign immunity to post-judgment interest against the Postal Service under similar federal employment statutes. *White v. Bloomberg,* 501 F.2d 1379 (4th Cir. 1974) and *Hall v. Bolger,* 768 F.2d 1148 (9th Cir. 1974). Although *White v. Bloomberg* and *Hall v. Bolger* were not Title VII cases, the courts' rationale conflicts with that of the Eighth Circuit below.

Furthermore, the opinion below resolves the interest issue in a manner seemingly inconsistent with *Franchise Tax Board of California v. United States Postal Service,* 467 U. S. 512 (1984) and with the Court's historical method of analyzing broad waivers of sovereign immunity such as the "sue and be sued" clause in the Postal Reorganization Act (herein referred to as "PRA"). The court below reasoned that because the PRA *preceded* the 1972 Amendments applying Title VII to federal agencies *and,* because there is no explicit reference to interest as an element of damages in Title VII, immunity remains in effect to bar interest awards. This logic denies prospective effect to the "sue and be sued" clause for a normal element of damages, interest, in causes of action which may become applicable to the Postal Service after its genesis.

The reasoning of the court below upsets the well-settled principle that, when Congress launches a governmental agency into the commercial world and endows it with authority to "sue or be sued", the agency is no less amenable to judicial process than a private enterprise under like circumstances would be. *Franchise Tax Board of California v. United States Postal Service, supra* at 520.

Finally, in the long run, the Eighth Circuit's decision does a disservice to the public interest. The Postal Service is one of the largest employers in the country generating much litigation under Title VII. Meritorious cases such as this might have been settled earlier had the Postal Service not enjoyed the free use of over Ninety Thousand Dollars of Loeffler's back pay for over five years.

The cloak of immunity denying prejudgment interest to successful plaintiffs allows the Postal Service to escape the same economic risks that confront other private sector employers. Only when this cloak is removed will the quality of management decision-making in employment matters at the Postal Service rise to the level of private industry in the free commercial world.

I. The Decision Below Conflicts With Three Other Circuits Allowing Interest Against The Postal Service.

On the issue of prejudgment interest under Title VII, the decision below openly and squarely conflicts with *Nagy v. United States Postal Service,* 773 F.2d 1190 (11th Cir. 1985). The single issue decided in *Nagy* was the same as that presented in this case. The *Nagy* court, citing *Franchise Tax Board,* distinguished the Postal Service due to the Reorganization Act's "sue and be sued" clause, from other federal agencies "shrouded with sovereign immunity". *Nagy v. United States Postal Service,* 773 F.2d. at 1192. In footnote 2, of the decision the *Nagy* court expressly embraced Judge Arnold's dissent in an earlier case before the Eighth Circuit on the same issue.[1]

The decision in *Nagy* followed this Court's approach to analyzing the scope of a general waiver of sovereign immunity. Citing *Federal Housing Administration v. Burr,* 309 U.S. 242 (1940) and *Franchise Tax Board,* the Eleventh Court reiterated that a "sue and be sued" clause creates a presumption of waiver of sovereign immunity. This presumption can be rebutted in a particular case only upon showing that a finding of waiver would either (1) be inconsistent with the statutory scheme; or, (2) gravely interfere with the government's function; or (3) be inconsistent with the plain purpose of Congress in that case to use "sue and be sued" in a narrow sense. The court then found no "plain" purpose in the 1972 amendments to Title VII to limit the general waiver of sovereign immunity in Section 401(1).

In *Nagy* the court also embraced *Milner v. Bolger,* 546 F.Supp. 375 (E.D. Cal. 1982) which squarely holds that the general no-interest rule applicable to federal agencies sued under Title VII does not apply to the Postal Service. This Court

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[1] *Cross v. United States Postal Service,* 733 F.2d 1327, 1332 (8th. Cir. 1984) (En Banc) (Arnold, J. dissenting) (equally divided Court), cert. denied ____ U.S. ____, 105 S. Ct. 1750 (1985).

also referred to *Milner v. Bolger* as authority in *Franchise Tax Board* when it stated: ". . .[t]he nearly universal conclusion of the lower federal courts has been that the Postal Reorganization Act constitutes a waiver of sovereign immunity". *Id.* at 519, n.12.

However, in the present case, by a slim majority, the Eighth Circuit explicitly rejected the reasoning of the *Nagy* court on the grounds that at the time Congress passed the Postal Reorganization Act, it had not yet extended Title VII to federal agencies. Consequently, the court's decision below has resulted in a conflict between it and the Eleventh Circuit as well as the District Court in another circuit.

To the extent that the decision of the court below rejects the significance of the "sue or be sued" language of the 1970 PRA, it conflicts with decisions in the other circuits on this issue. In *White v. Bloomburg,* 501 F.2d. 1379 (4th Cir. 1974), the court held that the "sue and be sued" clause of the PRA required the Postal Service to pay interest on judgments resolved against it just like any other private employer. The *White* Court followed the traditional analysis that a broad waiver of immunity like that found in the PRA cannot be restricted by inference except under exceptional circumstances.

Likewise, in *Hall v. Bolger,* 768 F.2d 1148 (9th Cir. 1985) the Ninth Circuit held that post-judgment interest on an award of attorney's fees against the Postal Service under 29 U.S.C. Section 791, forbidding handicap discrimination, was not barred by sovereign immunity. Citing *Franchise Tax Board,* the court found that Congress had waived sovereign immunity with respect to awards of post-judgment interest against the Postal Service by way of the "sue and be sued" clause and that the Postal Service's liability is the same as any other business. In *Hall* the court cited with approval Judge Arnold's dissent in *Cross v. United States Postal Service,* 733 F.2d 1327, 1332 (8th Cir. 1984) (En Banc). *Hall v. Bolger, supra* at 1151. Clearly then, the issue of the effect of the "sue and be sued" clause on

the Postal Service's amenability to interest requires this Court's final authoritative voice.

The split among the four circuits on the interest issue has been noted in a related case in the Fifth Circuit in (*R & R Farm Enterprises v. Federal Crop Ins. Corp.*, 788 F.2d 1148, 1153, n.5 (5th Cir. 1986) and by the Second Circuit in a recent decision analyzing the scope of the waiver of immunity in the "sue or be sued" clause of Section 401(1). *Active Fire Sprinkler Corp. v. The United States Postal Service and John T. Brady and Co.*, Slip Opinion, No. 86-6034, (1st. Cir. Feb. 3, 1987). Obviously, the circuits are fractured on the interest issue and require this Court's guidance on this troublesome and recurring question.[2]

II. The Decision Below Is Inconsistent With This Court's Characterization Of The Postal Service's Liability As The Same As That Of Any Other Business.

In a recent unanimous decision, this Court explicitly stated ". . . *we must presume that the Service's liability is the same as that of any other business.*" *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 520 (1984) (*emphasis added*). In *Franchise Tax Board*, the court held that sovereign immunity is not a bar to a state agency's order commanding the Postal Service to withhold delinquent taxes from employees' wages. The Court said that "Congress . . . indicated [in the Postal Reorganization Act of 1970] that *it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department.*" *Id.* at 2553-54 (emphasis added). Significantly, the Court in *Franchise Tax Board* cited *Milner v. Bolger*, 546 F.Supp. 375 (E.D. Cal. 1982) with approval. *Milner*

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[2] Indeed, the Eighth Circuit alone has seated *two* En Banc panels to deal solely with the prejudgment interest issue against the Postal Service under Title VII. In addition to the 6-5 en banc decision below, the court En Banc previously split 4-4 in *Cross v. United States Postal Service*, 733 F.2d 1332 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 1750 (1985).

squarely holds that the general no-interest rule applicable to federal agencies sued under Title VII does not apply to the Postal Service. This Court already considers the Postal Service to be like a private commercial enterprise for purposes of sovereign immunity. There is no logical reason for deciding as the court below did, that the Postal Service is immune from interest awards while at the same time this Court holds that the PRA eliminated its immunity from civil process for tax delinquencies.

In *Library Of Congress v. Shaw*, ____ U.S. ____ 106 S.Ct. 2957 (1986) the court held that sovereign immunity bars an award of interest in Title VII cases against agencies of the federal government. However, in footnote 5 of its opinion the court clearly carved out an exception to the general no-interest rule: ". . . where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." 106 S.Ct. at 2963 n.5.

This Court's decisions in *Franchise Tax Board* and *Shaw* cannot be reconciled with the Eighth Circuit's decision in this case. The Court in *Shaw* did not qualify footnote 5 by saying that the Government must cast off the cloak only *after* passage of the 1972 amendments to Title VII. Judge Arnold's dissenting opinion in the decision below addresses this point well:

> *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986), a case decided after the oral argument in this case, is emphasized in Judge Bowman's well-argued opinion for the Court En Banc. *Shaw* holds that sovereign immunity bars an award of prejudgment interest in Title VII cases against agencies of the federal government. If the Postal Service were an agency of the federal government in the same sense as the Library of Congress, *Shaw* would be in point, and I would be constrained to adopt the view taken by the Court. But the Postal Service is not a federal agency in this simple, unqualified sense. Since 1970 it has had a special status. "Congress . . .indicated [in the Postal Reorganization Act

of 1970] that it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board of California v. United States Postal Service, supra,* 104 S.Ct. at 2553-54 (footnote omitted).

As the Court recognizes, ante p.7, the *Shaw* opinion contains a qualification. It states that "[t]he no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." 106 S.Ct. at 2963 n.5. Has the Postal Service assumed the status of the sort of "private commercial enterprise" the Supreme Court had in mind? Obviously there are respects, and important ones, in which the Postal Service is unlike a private employer. But I do not believe that sovereign immunity with regard to an ordinary incident of relief in a civil action is one of those differences. The Supreme Court in *Franchise Tax Board,* a unanimous opinion decided just two years before *Shaw,* and not referred to at all by the *Shaw* court, specifically stated that sue and be sued clauses are to be liberally construed and that "we must presume that the [Postal] Service's liability is the same as that of any other business." 104 S.Ct. at 2554. It seems, then, that the Court considers the Postal Service to be like a private commercial enterprise for purposes of sovereign immunity.

Loeffler v. Carlin, ____ F.2d. ____ (8th Cir. En Banc 1987) (Arnold, J. dissenting) (A-10,11).

The court's decision below denies prospective effect to the "sue and be sued" clause for a normal element of damages, interest, in causes of action which became applicable to the Postal Service after its genesis. According to this reasoning, Congress would have to expressly state in each new piece of legislation that interest is available against identified federal instrumentalities which, by acts of Congress, have assumed the status of private commercial enterprise. In effect, the court below has

undercut the presumption against inferred restrictions to broad waivers of sovereign immunity.

The decision also damages the well-settled presumption that the words "to sue and be sued" embrace all well-known remedies available to suitors, including interest. *Standard Oil Co. v. United States,* 267 U.S. 76, 79 (1975)[3] If left to stand, the decision will endanger well-established principles set by this Court to guide lower federal courts in measuring the scope of broad waivers of sovereign immunity.

III. The Public Interest Is Best Served By Allowing Prejudgment Interest Against The Postal Service Under Title VII.

The number of reported Title VII cases against the Postal Service is indeed great.[4] Requiring the Postal Service to pay prejudgment interest would encourage prompt settlement of meritorius cases. The Service fired Loeffler illegally from his position as a rural carrier in December of 1979. He lost the use of over Ninety-Thousand Dollars in his earnings for more than five years. The Postal Service was unjustly enriched with the use of his back pay, lessening its incentive to carefully evaluate the wisdom of pursuing the merits of this case all the way through to appeal. (*See* Appendix, p. A-12)

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[3] This Court recently characterized prejudgment interest as "an element of complete compensation." *West Virginia v. United States,* 479 U.S. ____, 93 L.Ed. 2d 639 at 646. 107 S. Ct. ____, (Jan. 1987).

[4] *106* cases against the Postal Service were reported in a Westlaw search of Allfeds: TITLE ("Postal Service" "Postmaster General") and ("Title VII"/s "Civil Rights Act") ("42 U.S.C. **" + 5 2000(e))

61 cases were reported in a similar search: TITLE ("Postal Service" "Postmaster General") & DIGEST, SYNOPSIS (("Title VII"/s Civil Rights Act") ("42 U.S.C. **" + 5 2000(e))

The public interest would be well served by imposing on managers of the Postal Service the same economic risks that are faced by private commercial enterprises. This was the intent of Congress in passing the Postal Reorganization Act. Absent the risk of incurring interest, the Postal Service will be more inclined to litigate, appeal and relitigate meritorious cases. With an ever-burgeoning caseload in the federal courts, relieving the Postal Service of the need to consider prejudgment interest only increases the likelihood of more needless litigation. Clearly, Congress could not have intended this result when it authorized the Service to "sue or be sued".

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 5, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-2553, 84-2574

Theodore J. Loeffler,
Appellee/Cross-Appellant,

v.

Preston R. Tisch,* Postmaster
General of the United States,
Appellant/Cross-Appellee.

Submitted: May 15, 1986

Filed: December 8, 1986

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, HEANEY, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, *en banc*.

BOWMAN, Circuit Judge.

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* Preston R. Tisch, successor in office to Paul N. Carlin, the original named appellant/cross-appellee, has been substituted as a party under Fed. R. App. P. 43(c)(1).

This is a Title VII case brought against the Postmaster General of the United States in his capacity as head of the United States Postal Service. The plaintiff, Theodore J. Loeffler, complained that he had been fired because of his sex. He has prevailed on the merits. The question presented is whether prejudgment interest can be awarded as an element of the relief. We hold that it cannot be.

This issue first came before us in *Cross v. United States Postal Service*, 733 F.2d 1327 (8th Cir. 1984). There, a panel of this Court held, with Judge Arnold dissenting, that sovereign immunity bars an award of prejudgment interest in actions against the Postal Service under Title VII. Thereafter, rehearing en banc was granted, thus vacating the panel opinion. On rehearing, the judges of this Court were evenly divided. 733 F.2d 1332 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1750 (1985). As a result, the judgment of the District Court in Cross's case, holding prejudgment interest unavailable, was affirmed, but our decision had no precedential effect. The issue was left open for future determination in someone else's case, either by another panel or by the Court en banc. Decisions by an equally divided court decide only the particular case. They have *res judicata*, but not *stare decisis*, effect.

The issue next came before a panel in the present case. The panel held, as the *Cross* panel had, that prejudgment interest could not be awarded. *Loeffler v. Carlin*, 780 F.2d 1365 (8th Cir. 1985). The Court again granted rehearing en banc. On rehearing, we find the reasoning of the *Cross* panel persuasive, and we adopt the substance of the opinion of that panel.

Our conclusion is strongly reinforced by the recent decision of the Supreme Court in *Library of Congress v. Shaw*, 106 S. Ct. 2957 (1986), holding that Congress, in enacting Title VII, did not waive the Government's immunity from interest. The reasoning of *Shaw* is quite instructive. The Court's opinion, written by Justice Blackmun, forcefully expresses the long-

established rule that absent *express* congressional consent, interest cannot be awarded against the Government.

> In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. This requirement of a separate waiver reflects the historical view that interest is an element of damages separate from damages on the substantive claim.

Id. at 2961. The Court emphasizes "the rule that interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress." *Id.* at 2962. Rejecting Shaw's argument that Congress waived the Government's immunity from interest in Title VII actions by making the United States liable "the same as a private person" for "costs," including "a reasonable attorney's fee," 42 U.S.C. § 2000e-5(k), the Court noted that "we must construe waivers strictly in favor of the sovereign and not enlarge the waiver 'beyond what the language requires.' " *Id.* at 2963. The Court further noted that "[t]he no-interest rule provides an added gloss of strictness upon these usual rules." *Id.*

In addition, the Court specifically disagreed with Shaw's claim that Congress, by equating the liability of the United States with that of a private party, waived the Government's immunity from interest. The Court reasoned as follows:

> It was not until 1972 that Congress waived the Government's immunity under Title VII as a defendant, affording federal employees a right of action against the Government for its discriminatory acts as an employer. See § 717, 42 U.S.C. § 2000e-16(d). That § 706(k) already contained language equating the liability of the United States [as a plaintiff] for attorney's fees to that of a private person does not represent the requisite affirmative congressional choice to waive the no-interest rule. . . .

Id. at 2964.

The reasoning of the Court in *Shaw* is fully applicable to the present case. In the Postal Reorganization Act of 1970, Congress provided that the postal Service may "sue and be sued in its official name." 39 U.S.C. § 401(1). That act, however, did not authorize Title VII actions against the Postal Service. Instead, such authorization did not come until 1972, when Congress amended Title VII and extended it for the first time to the Postal Service and other federal entities. *See* 42 U.S.C. § 2000e-16. As *Shaw* establishes, this extension of Title VII to the federal sector did not waive the immunity of these federal entities with respect to interest.

Nor does the sue-and-be-sued clause of the Postal Reorganization Act provide congressional authorization for awarding interest in Title VII actions against the Postal Service. In the first place, for reasons discussed in the panel opinion in *Cross,* we are convinced that Congress did not intend to place postal employees in a better position than all other federal employees with respect to interest in Title VII cases. *See Cross,* 733 F.2d at 1330. Moreover, we believe the case is governed by a fundamental principle: that a sue-and-be-sued clause does not expand the obligations of a federal entity in a suit brought pursuant to another statute that is itself a waiver of immunity and which constitutes an exclusive remedy. Loeffler's action was not brought under the sue-and-be-sued clause of the Postal Reorganization Act. Instead it was brought under Title VII as amended in 1972. As required by Title VII, the defendant in Loeffler's action is the Postmaster General, not the Postal Service in its official name. There can be no doubt that the 1972 amendments to Title VII created "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown v. General Services Administration,* 425 U.S. 820, 829 (1976). Thus it is apparent that the sue-and-be-sued clause of the Postal Reorganization Act has no bearing upon the present case, and that the scope of Loeffler's remedy must be determined by reference to Title VII, just as in the case of any other federal agency.

It is noteworthy that in both *Federal Housing Administration v. Burr,* 309 U.S. 242 (1940), and *Franchise Tax Board v. United States Postal Service,* 467 U.S. 512 (1984), sue-and-be-sued clauses are discussed in terms of amenability to process. On the other hand, interest is an aspect of damages. Thus, interest is relevant to remedy rather than to amenability to process. *See Shaw,* 106 S. Ct. 2957. Yet in the present case, the sue-and-be-sued clause does not even make the Postal Service amenable to process. Instead, the Postal Service is amenable to process in a Title VII case only under the federal sector provisions of Title VII. It follows that the scope of Loeffler's remedy must be determined by reference to the federal sector provisions of Title VII, and not be reference to the sue-and-be-sued clause of the Postal Reorganization Act.

The foregoing discussion exposes the fundamental flaw in the reasoning of *Nagy v. United States Postal Service,* 773 F.2d 1190 (11th Cir. 1985), holding the Postal Service liable for interest on a Title VII back pay award. In *Nagy,* the court starts with the premise that the Postal Reorganization Act presumptively waived the Postal Service's immunity for *all purposes,* including Title VII. That premise, however, is completely invalid, because in enacting the Postal Reorganization Act Congress specifically rejected the idea of making the Postal Service liable under Title VII as a private employer. *See Cross,* 733 F.2d at 1330. Until Congress some two years after passing the Postal Reorganization Act amended Title VII to extend it to the federal sector with additional provisions applicable only to that sector, there had been no congressional waiver, presumptive or otherwise, of the Postal Service's immunity to Title VII actions. Thus, with all respect, we cannot agree that the *Nagy* opinion reached a correct result.[1]

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[1] The other post-*Cross* court of appeals decision awarding interest against the Postal Service in an employment discrimination case, *Hall v. Bolger,* 768 F.2d 1148 (9th Cir. 1985), is not a Title VII case and therefore is not in point.

The situation in the present case is closely analogous to that in cases arising under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. As this Court held in *Peak v. Small Business Administration,* 660 F.2d 375, 377 (8th Cir. 1981), the FTCA is the exclusive remedy in tort actions against the Government, and this is so despite the statutory authority of any federal agency "to sue and be sued in its own name." *See* 28 U.S.C. § 2679(a). Accordingly, tort actions against the Postal Service may not proceed under the sue-and-be-sued clause as if the Postal Service were a private company, but must proceed under the FTCA with all of that Act's limitations on its waiver of sovereign immunity. *See Insurance Co. of North America v. United States Postal Service,* 675 F.2d 756 (5th Cir. 1982) (per curiam); *Contemporary Mission, Inc. v. United States Postal Service,* 648 F.2d 97, 104-05 n.9 (2d Cir. 1981); *Sportique Fashions, Inc. v. Sullivan,* 597 F.2d 664, 665-66 n.2 (9th Cir. 1979). Congress made the Postal Service subject to the FTCA, and therefore in a tort action the Postal Service is treated like any other federal agency.

Similarly, Congress has made the Postal Service subject to the federal sector provisions of Title VII. Like the FTCA, Title VII as extended by Congress to the federal sector constitutes a limited waiver of sovereign immunity and a comprehensive, exclusive remedy for the kinds of injuries that are within its purview. It follows that in a Title VII action, the Postal Service must be treated like any other federal agency. And as the Supreme Court has made clear in *Shaw,* federal agencies sued under Title VII are not subject to interest awards, since Congress has not waived the Government's sovereign immunity to interest awards in such actions.

In footnote 5 of the *Shaw* opinion, the Court stated that the requirement of an express waiver of sovereign immunity as to interest is "inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise. *See, e.g., Standard Oil Co. v. United States,*

267 U.S. 76, 79 (1925)." 106 S. Ct. at 2963 n.5. In a supplemental filing, Loeffler relies on this footnote and argues that the effect of the sue-and-be-sued clause of the Postal Reorganization Act is to remove the cloak of immunity from the Postal Service by conferring upon it the status of a private enterprise. This reliance on footnote 5 of the *Shaw* opinion is misplaced, however, for the simple reason that Congress never has conferred upon the Postal Service the status of a private enterprise for purposes of Title VII actions. To the contrary, Congress explicitly treated the Postal Service as a federal agency when it amended Title VII in 1972 to make the Postal Service and other federal agencies amenable to suit under Title VII. This stands in sharp contrast to the sue-and-be-sued clause, which never has authorized Title VII actions against the Postal Service. Instead, as previously noted, Title VII actions against the Postal Service and other federal agencies can be brought only in accordance with the explicit and detailed federal sector provisions of Title VII. Congress provided for attorneys' fees and costs in such actions, but did not provide for interest, and we may presume that it made this choice with full awareness of the traditional rule that interest does not lie on awards against the Government absent an express provision to the contrary. In any event, because of the manner in which Congress extended Title VII to the Postal Service it is abundantly clear that for purposes of Title VII Congress has chosen to treat the Postal Service as a federal agency, not as a private enterprise.

Moreover, Loeffler's private enterprise argument fails because it is clear the Postal Service's legal relationship with its employees is predominantly that of a federal agency, not that of an ordinary business. For example, Postal Service employees are appointed under the postal career service, which is part of the federal civil service. 39 U.S.C. § 1001(b). Further, under 39 U.S.C. § 1005, Postal Service employees specifically are subject to a number of other protective provisions applicable to all federal employees. As the panel opinion in *Cross* points out, the Postal Reorganization Act and its legislative history con-

clusively establish that under that Act postal employees are to be treated in exactly the same way as other federal employees for equal employment opportunity purposes. 733 F.2d at 1330. It is, therefore, apparent that Congress has not relegated the Postal Service to private enterprise status insofar as many of the rights and remedies of its employees vis-a-vis the Service are concerned. It is also apparent that Congress did not intend to place postal employees in a better position than all other federal employees with respect to interest in Title VII cases.

Finally, we do not believe that *Franchise Tax Board* supports Loeffler's position. In holding that the sue-and-be-sued clause of the Postal Reorganization Act rendered the Postal Service amenable to administrative process requiring it to withhold delinquent state income taxes from the wages of postal employees, the Supreme Court observed "that waiver of sovereign immunity is accomplished not by 'a ritualistice formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." 467 U.S. at 521 (citation omitted). When we examine congressional policy applicable to the present case, it becomes apparent that (1) the Postal Reorganization Act did not waive the immunity of the Postal Service from liability under Title VII; (2) the subsequent amendments of Title VII that extended it to the Postal Service and other federal sector defendants do not provide for interest on Title VII judgments against these defendants. In short, reference to congressional policy leads inexorably to the conclusion that Congress has not waived the immunity of the Postal Service from interest on Title VII awards.

The judgment of the District Court denying prejudgment interest on Loeffler's Title VII award is affirmed.

It is so ordered.

ARNOLD, Circuit Judge, with whom LAY, Chief Judge, HEANEY, McMILLIAN, and JOHN R. GIBSON, Circuit Judges join, dissenting.

Today the Court holds that prejudgment interest can never be awarded to prevailing plaintiffs in Title VII actions against the United States Postal Service. It thus creates a square conflict with *Nagy v. United States Postal Service,* 773 F.2d 1190 (11th Cir. 1985), the only other appellate opinion directly in point.

For the reasons given in my dissenting opinion in *Cross, supra.* 733 F.2d at 1330, I respectfully dissent. I add a few words to address briefly certain post-*Cross* developments that fortify the conclusion I reached there.

The Eleventh Circuit has now held that the barrier of sovereign immunity was "deliberately lifted by Congress when it created the Postal Service," and that prejudgment interest on back-pay awards is therefore available. *Nagy v. United States Postal Service, supra. Cf. Hall v. Bolger,* 768 F.2d 1148 (9th Cir. 1985) (post-judgment interest on award of attorneys' fees against Postal Service under 29 U.S.C. § 791, forbidding discrimination by reason of handicap, not barred by sovereign immunity). *But cf. Frazier v. United States Postal Service,* 790 F.2d 873 (Fed. Cir. 1986) (per curiam) (Merit Systems Protection Board has no authority to award interest on back-pay award). Moreover, a recent decision of the Supreme Court explicitly states "we must presume that the [Postal] Service's liability is the same as that of any other business." *Franchise Tax Board of Cal. v. United States Postal Service,* 104 S. Ct. 2549, 2553 (1984) (sovereign immunity no bar to state agency's order commanding Postal Service to withhold delinquent taxes from employees' wages).

Library of Congress v. Shaw, 106 S. Ct. 2957 (1986), a case decided after the oral argument in this case, is emphasized in Judge Bowman's well-argued opinion for the Court en banc. *Shaw* holds that sovereign immunity bars an award of prejudgment interest in Title VII cases against agencies of the federal government. If the Postal Service were an agency of the federal government in the same sense as the Library of Congress, *Shaw*

would be in point, and I would be constrained to adopt the view taken by the Court. But the Postal Service is not a federal agency in this simple, unqualified sense. Since 1970 it has had a special status. "Congress . . . indicated [in the Postal Reorganization Act of 1970] that it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board of Cal. v. United States Postal Service, supra,* 104 S. Ct. at 2553-54 (footnote omitted).

As the Court recognizes, *ante* p. 7, the *Shaw* opinion contains a qualification. It states that "[t]he no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." 106 S. Ct. at 2963 n.5. Has the Postal Service assumed the status of the sort of "private commercial enterprise" the Supreme Court had in mind? Obviously there are respects, and important ones, in which the Postal Service is unlike a private employer. But I do not believe that sovereign immunity with regard to an ordinary incident of relief in a civil action is one of those differences. The Supreme Court in *Franchise Tax Board,* a unanimous opinion decided just two years before *Shaw,* and not referred to at all by the *Shaw* court, specifically stated that sue-and-be-sued clauses are to be liberally construed *and* that "we must presume that the [Postal] Service's liability is the same as that of any other business." 104 S. Ct. at 2554. It seems, then, that the Court considers the Postal Service to be like a private commercial enterprise for purposes of sovereign immunity.

Our Court's position comes down to this: when the Postal Reorganization Act was passed in 1970, creating the Postal Service and subjecting it to a sue-and-be-sued clause, sovereign immunity was waived, but not so far as Title VII was concerned, because at that time Title VII did not apply to any federal instrumentality, including the Postal Service. Later, when Title VII did come into the federal-government-employment picture,

nothing was said in so many words about interest. Therefore immunity remains in effect to bar interest awards. I cannot claim that the Supreme Court's *Franchise Tax Board* opinion conclusively rejects that position. But I do think that the opinion is more naturally read to support my view. In addition to the arguments already advanced, I call attention especially to another statement in *Franchise Tax Board.* After stating that "[t]he nearly universal conclusion of the lower federal courts has been that the Postal Reorganization Act constitutes a waiver of sovereign immunity," 104 S. Ct. at 2553 n.12, the Court cites a number of opinions with approval. One of them, see *id.* at 2554 n.12, is *Milner v. Bolger,* 546 F. Supp. 375 (E.D. Cal. 1982). *Milner* squarely holds that the general no-interest rule applicable to federal agencies sued under Title VII does not apply to the Postal Service. The inclusion of *Milner* in a string citation in a footnote is of course not the equivalent of an unequivocal Supreme Court pronouncement. But it does lend additional support to my position.

For these reasons, I would hold that an award of prejudgment interest against the Postal Service under Title VII is not barred by sovereign immunity.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2553

Theodore J. Loeffler,
Appellee,

vs.

Paul N. Carlin, Postmaster General,
United States Postal Service,
Appellant.

No. 84-2574

Theodore J. Loeffler,
Appellant,

vs.

Paul N. Carlin, Postmaster General,
United States Postal Service,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 14, 1985
Filed: December 30, 1985

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

BOWMAN, Circuit Judge.

Theodore J. Loeffler sued the Postmaster General of the United States Postal Service (USPS) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, for discriminatory discharge on the basis of his sex. The District Court[1] found that plaintiff had established a prima facie case of sex discrimination and had proved by a preponderance of the evidence that defendant's articulated reason for the discharge was mere pretext. Finding that Loeffler was entitled to reinstatement to his former position without loss of seniority, the District Court awarded him full back pay and benefits reduced by the amount of interim earnings from other employment, but denied prejudgment interest on the monetary award. USPS appeals, challenging the sufficiency of the evidence supporting the finding of unlawful discrimination. Loeffler cross-appeals the denial of prejudgment interest on the monetary award. We affirm the judgment of the District Court.

I.

Plaintiff Loeffler, a male rural carrier, had been employed by USPS in Chesterfield, Missouri, for approximately ten years. There were four other full-time rural carriers in the Chesterfield post office, two of whom were female. Loeffler's discharge occurred as a result of his method of organizing "box-holder" mail prior to beginning his delivery route. Boxholder mail is third-class mail not bearing the name and address of postal patrons, but which is designated for delivery to the current resident or occupant at each rural mailbox. Prior to August 1979, rural carriers were permitted to "case" their boxholder mail if they wished to do so. "Casing" is a practice whereby the carrier inserts boxholder mail in each separation of his or her delivery case before leaving the post office work area to begin delivering the day's mail. Each separation in the delivery case contains the

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[1] The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

mail destined for a particular rural mailbox. The alternative to casing is to leave the boxholder mail in bundles and to collate it with each postal patron's other mail at the point of delivery, *i.e.*, at each individual mailbox. All the rural mail carriers preferred casing boxholder mail, believing it to be the most efficient, safe, and convenient method of delivery. A prohibition against the casing of boxholder mail was implemented in August 1979 by USPS headquarters in Washington. Regional offices were directed to relay the instructions to local offices.[2]

The rule against casing was violated openly by Loeffler and the two female carriers. The other carriers complied with the rule and were not involved in any disciplinary action. Each of the rural carriers received approximately the same amount of boxholder mail, and violations of the rule by any of the carriers could be observed with equal opportunity by the supervisors. Loeffler and the two female carriers, Cathy Selz and Julie Wachter, committed violations with roughly the same frequency, and made no attempts to conceal their actions, which in all cases were performed in plain view of their supervisors.

Loeffler was caught violating the rule on four occasions, for which he received a seven-day suspension, two fourteen-day suspensions, and finally a letter of dismissal followed by a decision letter giving the effective date of the discharge. Selz was caught casing on at least three occasions, for which she received a letter of warning, a seven-day suspension, and a threat of dismissal (upon which no action was taken when she was again observed casing). Wachter was observed violating the rule on numerous occasions; she received a verbal warning but no other form of discipline.

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[2] The rule against the casing of boxholder mail was enforced until March 1980, when once again the method of delivery was left to the discretion of the carrier.

Loeffler filed an appeal of his discharge with the Merit Systems Protection Board (MSPB). After a hearing, the presiding official of the MSPB issued a decision affirming the discharge. Loeffler then filed an appeal with the Equal Employment Opportunity Commission (EEOC). The EEOC affirmed the MSPB findings.

Loeffler subsequently filed the present suit under Title VII in the District Court. Following a bench trial, the District Court found that Loeffler had established a prima facie case of disparate treatment based on sex. USPS introduced testimony that Loeffler's admittedly harsher and more frequent punishment and ultimate discharge resulted from the fact that he was observed violating the anti-casing rule more frequently. Making credibility determinations to resolve conflicting testimony, the court concluded that Loeffler had carried the burden of rebutting the defendant's articulated nondiscriminatory reason for the discharge. The evidence included a demonstration of the high visibility of "cased" boxholder mail, the ample opportunities for the supervisors to observe violations of the rule against casing, the paternalistic attitude of one of the supervisors toward employee Selz, and the flagrancy of the violations by both Loeffler and the two female carriers, all of whom violated the rule at every opportunity. The preponderance of the evidence, as credited by the trial court, established that Loeffler was discharged for the same offense committed by two similarly situated women; that one of the women (Wachter) was not disciplined at all; that the other woman (Selz) received lesser penalties than those imposed upon Loeffler; and that USPS's asserted justification for the disparate treatment accorded to Loeffler was pretextual.

II.

USPS contends that the District Court did not make the necessary finding that Loeffler was subjected to discriminatory treatment because of his sex, and argues further that the record

will not support such a finding. We cannot agree with either contention.

The first argument is without merit. The District Court's memorandum opinion and the trial record make ample reference to Loeffler's sex as being the basis of the discriminatory treatment to which his supervisors subjected him. The court specifically found that the rule against casing was violated consistently by Loeffler and the two female carriers, and that their violations were so blatant that the rule became a joke. The court also found that in contrast to Loeffler, the two female carriers were either lightly disciplined or not disciplined at all for their violations of the casing rule, although each continued to case her boxholder mail and was observed by her superiors to be committing violations. A supervisor on at least one occasion jokingly commented to Wachter about her violations and took no disciplinary action. The court specifically found that Loeffler and the two female carriers all committed violations with roughly the same frequency, but that the two female employees were either not charged with violating the rule against casing or were administered substantially less discipline than Loeffler, notwithstanding their continued violations. The court further found that at least one of the supervisors was aware of the frequent violations by the women but intentionally overlooked them. In its conclusions of law, the District Court noted that while USPS had the right to discharge or otherwise discipline employees who refused to follow the rules, the method of discipline chosen must be applied equally to all violators, and that some violators may not be protected merely because of their gender. In view of these findings of fact and conclusions of law, it is plain that the District Court's judgment in favor of Loeffler on his Title VII claim is premised on the court's determination that Loeffler was the victim of impermissible gender-based discrimination.

As to the sufficiency of the evidence, USPS argues that the record does not show that Loeffler and the two female

employees were similarly situated, since only Loeffler had a prior disciplinary record and was clearly insubordinate to his supervisors. It argues further that this continuing problem of insubordination was an alternative nondiscriminatory explanation for the discharge which was not considered by the District Court.

We reject this argument. The nondiscriminatory reason that USPS articulated before the District Court was that Loeffler was the only person caught at such frequent violations, not that he was discharged for open defiance of his superiors and for his prior disciplinary record. New nondiscriminatory reasons for plaintiff's discharge may not be articulated for the first time on appeal.

Thus the narrow question remaining is whether the record supports the District Court's finding that Loeffler was improperly discriminated against on the basis of his sex. The District Court, applying the well-established standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981), found that Loeffler had established a prima facie case of discriminatory discharge by showing that all the rural carriers were opposed to the "no casing" rule, that Loeffler and the two female carriers violated it openly at every opportunity, that management had equal opportunity to observe all violations of the rule, and finally, that Loeffler was ultimately discharged for his actions while neither of the two female employees received discipline of comparable severity, despite their admitted violations. While the defendant was able to articulate a legitimate, nondiscriminatory reason for the disparity in treatment — that plaintiff's harsher treatment and discharge resulted from the fact that he was the only carrier caught frequently in the act of violating the rule and that punishment was meted out according to the number of violations observed — the trial court found that Loeffler had demonstrated that the articulated reason was mere pretext. In

Tate v. Weyerhaeuser Co., 723 F.2d 598 (8th Cir. 1983), *cert. denie,* 105 S. Ct. 160 (1984), this Court stated that a plaintiff may show that the employer's proffered reason for discharge was not the real reason "by 'persuading the court that a discriminatory reason more likely motivated the employer' or by 'showing that the employer's proffered explanation is unworthy of credence.' " *Id.* at 603 (quoting *Burdine,* 450 U.S. at 256). Stated otherwise, "the district court must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716 (1983). The District Court found that Loeffler's explanation was more credible and that he had established that his discharge was in violation of Title VII.

A district court's finding of discriminatory intent under the *Green-Burdine* standard "is a factual finding that may be overturned on appeal only if it is clearly erroneous." *Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1508 (1985) (citing *Pullman-Standard v. Swint,* 456 U.S. 273 (1982)). The Supreme Court in *Anderson* stated that the basic principle governing appellate review of a district court's finding of discrimination is that " 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " 105 S. Ct. at 1511 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). When the finding of discriminatory intent is based on the trial court's assessment of the credibility of the witnesses, appellate courts must give even greater deference to the trial court's finding, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson,* 105 S. Ct. at 1512. *See King v. Yellow Freight System,* 523 F.2d 879, 882 n. 7 (8th Cir. 1975).

In the present case, the District Court's decision ultimately turned in its assessment of the credibility of the witnesses. Viewing the record as a whole, and giving appropriate deference to the District Court's credibility determinations, we conclude that neither the ultimate finding that Loeffler's discharge was an act of discrimination based on his sex, nor any of the court's subsidiary findings, is clearly erroneous. Accordingly, the judgment in favor of Loeffler on his Title VII claim must be affirmed.

III.

Loeffler contends that the District Court erred in denying prejudgment interest on his back pay award.

In *Cross v. United States Postal Service,* 733 F.2d 1327 (8th Cir.), *aff'd en banc by an equally divided court,* 733 F.2d 1332 (8th Cir. 1984), *cert. denied,* 105 S. Ct. 1750 (1985), this Court first considered whether prejudgment interest should be available in Title VII actions against USPS. The panel opinion of this Court, which affirmed the district court's denial of prejudgment interest, was automatically vacated when the case went en banc. Our en banc order, however, affirmed, without opinion and by an equally divided court, the judgment of the district court denying prejudgment interest.

Loeffler relies here principally on *Franchise Tax Board v. United States Postal Service,* 104 S. Ct. 2549 (1984), a case decided by the Supreme Court after our panel decision but before our en banc decision in *Cross.* At the time of our en banc decision in *Cross,* we considered the implications of *Franchise Tax Board,* which held that USPS is not immune from a state administrative process seeking to garnish the wages of its employees. That case did not address the issue of whether USPS is liable for prejudgment interest in a Title VII case. Thus, despite broad language in the Court's opinion equating USPS with private employers, *Franchise Tax Board* did not decide the question presented here.

In denying Loeffler's claim for prejudgment interest, the District Court relied on our en banc affirmance of the trial court's denial of prejudgment interest in *Cross*. We believe that this reliance is both understandable and proper, for Judge Wangelin, the District Judge in the present case, was also the District Judge in *Cross*. Although it may be true that our en banc order in *Cross* has little precedential value, it did affirm Judge Wangelin's decision in that case, and in that sense it established the law for our circuit. We therefore believe that it would be inappropriate for our panel to do otherwise than to conclude that in the present case Judge Wangelin correctly relied upon *Cross*. If the question of prejudgment interest is to be reconsidered, it should be reconsidered by the Court en banc, not by a three-judge panel.[3] Accordingly, we affirm the District Court's denial of Loeffler's request for prejudgment interest.

IV.

For the reasons stated above, we affirm the judgment of the District Court in favor of Loeffler on his Title VII claim, and we also affirm the judgment of the District Court denying Loeffler's claim for prejudgment interest.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[3] We note that on October 21, 1985 the Eleventh Circuit became the first circuit to hold the USPS liable for prejudgment interest in a Title VII case. *See Nagy v. United States Postal Service*, 773 F.2d 1190 (11th Cir. 1985). The decision rejects the position taken by our panel opinion in *Cross* that the 1972 amendments to Title VII, which extended Title VII to federal employers, including specifically the USPS, do not give USPS employees any greater rights than those given to employees of other federal employers covered by those amendments. If *Cross* can be said to represent the law of our circuit, then there is now a split between our circuit and the Eleventh Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 81-1121 C (D)

Theodore J. Loeffler,
Plaintiff,

v.

William Bolger, Postmaster General
United States Postal Service,
Defendant.

ORDER

(Filed Oct. 25, 1984)

This matter is before the Court sua sponte.

A determination of whether prejudgment interest will be awarded in this cause has been stayed pending the appeal of *Cross v. United States Postal Service, et al.*, No. 77-613 C (D), which involved the same issue. The Eighth Circuit affirmed this Court's decision that prejudgment interest should be denied.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's request for prejudgment interest be and is DENIED.

Dated this 25th day of October, 1984.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 81-1121 C (D)

Theodore J. Loeffler,
Plaintiff,

vs.

William Bolger, Postmaster General
United States Postal Service,
Defendant.

MEMORANDUM AND ORDER

(Filed Oct. 1, 1984)

This matter is before the Court upon plaintiff's motion for Order entering award of monetary damages. By Order dated December 27, 1982, this Court awarded judgment in favor of plaintiff on his Title VII claim, but stayed ruling on damages pending additional submissions by the parties.

Upon consideration of further materials submitted by the parties, the Court hereby amends its Order dated December 27, 1983 as follows.

AMENDED FINDINGS OF FACT

19. The amount of pay which plaintiff would have earned in his position as a rural carrier, had he not been terminated, is as follows:

1980	$19,411.00
1981	$22,576.00
1982	$24,670.00
1983	$25,214.00
Total	$91,871.00

20. Since the date of his termination, plaintiff has made a reasonable effort to obtain other employment. During that time period he worked cutting grass for a landscaper, cleaning out a warehouse, delivering telephone books, as a dispatcher, and in other odd jobs. In this employment he earned income as follows:

1980	$ 500.00
1981	$ 3,101.80
1982	$ 5,827.00
1983	$ 7,211.15
Total	$16,639.95

21. Since the date of his termination, plaintiff incurred medical expenses which would have been covered by the Postal Service Health Insurance Program, had he not been terminated. These expenses total Two Hundred Sixty Two Dollars ($262.00). No other expenses were incurred by plaintiff for medical treatment or for the cost of health insurance.

22. Since the date of his termination, plaintiff has purchased life insurance to replace insurance which would have been available to him had he not been terminated. The cost of that life insurance totalled Three Hundred Six Dollars and Fifty Six Cents ($306.56).

23. Had plaintiff not been terminated, he would have been entitled to participate in a retirement program whereby the Postal Service would contribute an amount equal to plaintiff's own contribution. The Postal Service's contribution would have been made directly to the fund.

AMENDED CONCLUSIONS OF LAW

The Court has previously held that plaintiff herein is entitled to reinstatement to this former position without loss of seniority and with full pay and benefits, and such reinstatement will be ordered. Differing views have been presented by the parties

with respect to the amount of back wages and fringe benefits to which plaintiff is entitled.

Plaintiff is clearly entitled to the amount of pay he would have received had he not been terminated. *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975). The parties have submitted different estimates of the proper back pay. The primary difference, however, was in the proper amount for each individual year; the total amount was substantially the same. Upon consideration of the evidence presented, the Court concludes that the proper award of back pay is Ninety One Thousand Eight Hundred Seventy One Dollars ($91,871.00).

Plaintiff's back pay award must be reduced by the amount of "interim earnings or amounts earnable with reasonable diligence" by the plaintiff. 42 U.S.C. § 2000e-5(g).

Accordingly,

IT IS HEREBY ORDERED that plaintiff be and is AWARDED back pay from the date of his termination to the date of his reinstatement decreased by the amount of income he has received in other employment; and

IT IS FURTHER ORDERED that plaintiff shall provide this Court with evidence regarding his back pay from the end of 1983 to the date of his reinstatement decreased by his income from that period; and

IT IS FURTHER ORDERED that plaintiff be and is REINSTATED to his position as a rural carrier with full rights and benefits, without regard to the time during which he was discharged.

Dated this 28th day of September, 1984.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 81-1121 C (D)

Theodore J. Loeffler,
Plaintiff,

vs.

William Bolger, Postmaster General,
United States Postal Service,
Defendant.

ORDER

(Filed Dec. 27, 1983)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that plaintiff Theodore J. Loeffler have judgment against defendant William Bolger on the complaint; and

IT IS FURTHER ORDERED that the parties shall submit additional findings in accordance with the accompanying Memorandum.

This Order shall not constitute a final Order for purposes of appeal.

Dated this 27th day of December, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 81-1121 C (D)

Theodore J. Loeffler,
Plaintiff,

vs.

William Bolger, Postmaster General,
United States Postal Service,
Defendant.

MEMORANDUM

(Filed Dec. 27, 1983)

This matter is before the Court for a decision upon the merits following a two-day trial held December 8-9, 1982. Plaintiff seeks judgment on his amended complaint alleging that he was discharged from his position as a rural postal carrier solely because of his sex, in violation of Title VII of the Civil Rights Act of 1964. Plaintiff seeks reinstatement without loss of seniority, purging of his personnel files, and back wages with interest.

After consideration of the testimony adduced at trial, the exhibits introduced into evidence, the briefs of the parties and the applicable law, the Court hereby makes and enters the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law is hereby adopted as such and, conversely, any conclusion of law equally applicable as a finding of fact is hereby adopted as such.

Findings of Fact

1. Plaintiff herein Theodore J. Loeffler, is a male citizen of the United States, and resides within the Eastern District of

Missouri. Defendant William Bolger is and was at all relevant times Postmaster General of the United Postal Service, (hereinafter Postal Service) which is an independent establishment of the Executive Branch of the United States government.

2. For approximately ten years, plaintiff was employed by the Postal Service as a rural carrier at the Chesterfield, Missouri Post Office.

3. On November 30, 1979, plaintiff was issued a letter from the Postal Service proposing to remove him from his position. Subsequently the Postal Service issued a decision letter dated December 21, 1979 advising him that his discharge was to be effective January 4, 1980. Plaintiff was involuntarily discharged from his position effective January 4, 1980.

4. On January 10, 1980, plaintiff filed an appeal from his discharge to the Merit Systems Protection Board (hereinafter MSPB), St. Louis field office. A hearing was held by the MSPB on February 13, 1980. On March 11, 1980, the presiding official of the MSPB issued his intitial decision affirming the discharge. This decision became final on April 15, 1980.

5. On May 10, 1980, plaintiff appealed the denial of his sex discrimination claim to the Equal Employment Opportunity Commission (E.E.O.C.), Office of Appeals and Review. On August 13, 1981, plaintiff received the final decision from the E.E.O.C. affirming the findings of the MSPB.

6. The E.E.O.C. decision advised plaintiff that he had a right to institute a civil action in the United States District Court within thirty days of receipt of the letter. Plaintiff subsequently filed his suit within the thirty-day time limit.

7. The termination of plaintiff's employment arose as a result of his practice of casing boxholder mail prior to beginning his delivery route. "Boxholder" mail consists of third-class mail which does not bear the name and address of a particular postal patron but which is provided to the carrier in a single bundle

and is designated for delivery to each current resident or occupant of a rural delivery mailbox. "Casing" is the practice of inserting the boxholders in each separation of the delivery case in the post office work area prior to delivery, and then inserting the first or second class mail inside the boxholders so that the boxholders form a convenient sleeve for the rest of the pieces of mail and thus make delivery quicker and easier. The alternative to casing the boxholders is to carry them as separate bundles and insert them into each individual post box during delivery.

8. Prior to September 10, 1983, rural carriers at the Chesterfield Post Office were permitted to case their boxholders if they so desired.

9. Pursuant to Postal Bulletin No. 21202, dated August 9, 1979 entitled "*Annual/Special Count of Mail on Rural Routes* —Section II C, *Casing of Mail by Carrier*", the rule regarding casing of mail was changed to read as follows:

> For the mail count period, the method of handling or casing boxholder mail shall be as directed by management. However, carriers cannot be required to carry more than two sets of boxholders as separate bundles on any one day. If more than two sets of boxholders are available for delivery (see Part II. C. 2) on any one day, the carrier may either carry the additional sets as separate bundles or case the additional sets of boxholders. The procedure established for the count period must be the same as that which will be followed the remainder of the year. Any changes to the existing practices must be presented to the carriers at the local conference conducted before the count (see part I. D. 1).

10. A prohibition on the casing of mail was implemented by the Postal Service headquarters in Washington, D.C., which directed regional offices to disseminate the instructions. The St. Louis Management Sectional Center received the instruction from the Chicago Regional Office, and thereafter informed

Robert Hunt (Officer in Charge of the Chesterfield Post Office) at a meeting in St. Louis on or about August 15, 1979. On or about August 16, 1979, Officer in Charge Hunt issued instructions to all rural carriers at the Chesterfield Post Office that effective September 10, 1979, the rural carriers must handle the first two sets of boxholders received for delivery on a given day as separate bundles, and that the carriers could not case the boxholders. The same instructions were repeated to all five rural carriers on September 10, 1979.

11. The rationale for the rule against casing boxholders was that it increased the carrier's "strap-out time", which is the time spent in the Post Office removing the mail from the carrier's case prior to delivery. The carriers preferred to case the boxholders because they thought it was faster, more efficient, and safer since it permitted less time to be spent at each mail box and prevented the need for loose bundles in the car.

12. On August 16, 1979, the rural carriers at the Chesterfield Post Office submitted to Robert Hunt a written statement in which the rural carriers offered to relinquish their right to pay for strap-out time on the condition that they once again be allowed to case boxholders. The management of the Chesterfield Post Office submitted these proposals to the St. Louis Management Sectional Center for consideration. St. Louis rejected the proposals.

13. At the Chesterfield Post Office, the Officer in Charge (Postmaster) was Robert Hunt until October 10, 1983, and thereafter was Don Wallace. The Superintendent of Postal Operations at all relevant times was Firmin Voss and the Superintendent of Mails and Delivery at all relevant times was Hugh Bird. The Chesterfield Post Office from August through December, 1979 employed approximately fifty persons of whom the following five were rural carriers: Theodore Loeffler (male); George Price (male); Ken Hundeldt (male); Kathy Selz (female); and Julie Wachter (female).

14. From September 10 through October 30, 1979, the rule against casing was violated consistently by Loeffler, Selz and Wachter. Violations were so blatant that the rule became a "joke" among certain carriers.

15. Loeffler was caught violating the rule on four occasions. The first time he received a seven-day suspension effective September 20, 1979. The second time he received a fourteen-day suspension effective October 5, 1979. The third time he received a fourteen-day suspension effective November 5, 1979. After the fourth incident there was a meeting at which Wallace, Bird and Loeffler were present and at which Loeffler refused to follow the rule. Loeffler then received his dismissal letter dated November 30, 1979.

16. Kathy Selz was caught casing on at least three different occasions. The first time she received a letter of warning on or about September 11, 1979. The second time she received a seven-day suspension effective October 5, 1979. The third time she attended a meeting with Wallace and Bird on November 23, 1979 at which she was instructed to comply with the rule or face dismissal. After the meeting she continued to case her boxholders and was at times observed by her superiors, but was not thereafter disciplined in any manner.

17. Julie Wachter was on numerous occasions observed by her superiors casing her boxholders. The first time she received a verbal warning. Thereafter she was not disciplined in any manner. On at least one occasion she was observed by Bird, who jokingly commented about her violations and took no action.

18. The supervisors had equal opportunity to observe all violations of the rule against casing boxholders. Since all three carriers received approximately the same number of boxholders, and since they each cased all of the boxholders they received, they all committed violations with roughly the same frequency. Loeffler, however, was specifically observed and disciplined on

each occasion that he broke the rule after it went into effect. The two female employees, by contrast, were either not found to be violating the rule, or were administered substantially less discipline than was Loeffler, despite their admitted continued violation. At least one of the supervisors, Bird, was aware of the frequent violations by the women but intentionally overlooked it.

Conclusions of Law

This Court has jurisdiction over the parties herein and has subject matter jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-16.

This case arises out of plaintiff's allegation that he was the victim of disparate treatment by the U.S. Postal Service. It is clear that defendant had the right to discharge or otherwise discipline its employees if they refused to abide by the rules. However, it is also clear that whatever method of discipline is chosen by defendant must be applied fairly and equitably to all violators, and that some violators may not be protected merely because of their gender.

The allocation of hearings and the order, presentation and proof in a Title VII discriminatory treatment case is set forth in *McDonnell Douglass Corp. v. Green,* 411 U.S. 792 (1973). Under that standard, plaintiff first has the burden of establishing by a preponderance of the evidence a prima facie case of disparate treatment. *Id.* at 802. If plaintiff is successful, the burden then shifts to defendant to demonstrate a legitimate, non-discriminatory reason for its action. *Id.* at 802-03. Finally, plaintiff must prove by a preponderance of the evidence that the reasons shown by defendant were merely a pretext for an underlying discriminatory intent. *Id.* at 804. The ultimate burden of persuasion, however, always remains with the plaintiff to prove his case by a preponderance of the evidence. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981).

In a discriminatory discharge case, plaintiff can establish a prima facie case by showing that other persons similarly situated but of a different sex received treatment different than the plaintiff. *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir.) *cert. denied,* 449 U.S. 879 (1980). In the present case, plaintiff has clearly made such a showing. All rural carriers were opposed to the ban on casing, and three of them violated it at every opportunity. Management was specifically put on notice that such blatant violations were occurring. Nevertheless, plaintiff received a total of five weeks of suspension and was ultimately terminated. Neither of the female employees received anything of comparable severity despite their admitted continued violations.

Defendant, however, has arguably shown a legitimate non-discriminatory reason for the disparity. He argues that plaintiff's harsher and more frequent punishment resulted from the fact that plaintiff was the only person *caught* at such frequent violations. Defendant argues further that each carrier was punished comparably according to the number of violations observed by management.

The validity of defendant's position turns primarily on the credibility of the witnesses presented. Defendant's witnesses testified that they had no way of knowing when violations occur unless they actually observed them occuring, and that all violations which were observed were reported and punished. However, all three carriers were equally subject to supervision, and violations could be checked, if the supervisor so desired, merely by checking the contents of the case.

In contrast to defendant's position is the consistent testimony of plaintiff's witnesses that management observed violation by three of the carriers. Violations by Wachter were even joked about; she was told by Bird to continue casing if she desired, but that if she were caught that he (Bird) would disclaim any such instruction. In two limited cases, violations by Selz were condoned by Postmaster Wallace, even though the reasons

presented by Selz, that of safety and efficiency, were the same cited by plaintiff as reasons for ignoring the rule. Judging the evidence as a whole, the Court finds it difficult to accept defendant's contention that all those who were "caught" were treated the same.

Even assuming the validity of defendant's position that plaintiff just "happened" to get caught more often, however, the Court finds there is ample showing that this argument is a mere pretext. Evidence points to a "paternalistic" attitude that Bird had toward Selz. Plaintiff has shown that violations of the rule by any carrier could have been observed or suspected by checking the contents of the case, by viewing the case from a distance, or by watching the speed at which the parcels were being deposited in the case, or by looking to see whether a separate bundle of boxholders was still present by the carrier's position on the date it was received. If the rule were of sufficient importance to management to warrant the firing of a ten-year employee with a record of efficiency and good performance, and if defendant were truly interested in treating all violators of the rule in the same manner, certainly more than reacting to chance observations of violations would have been appropriate.

In short, the Court finds that plaintiff has carried his burden under the *Green* standard. Either defendant intentionally imposed considerably harsher punishment on plaintiff than on the female employees who violated the rule, or else they engaged in considerably closer scrutiny of plaintiff to detect his violations. Either way, defendant is guilty of discriminatory treatment.

In view of the above, the Court finds that defendant is guilty of discriminating against plaintiff in the course of his employment in violation of Title VII of the Civil Rights Act of 1964, and that plaintiff is entitled to reinstatement and back wages. However, plaintiff has failed to provide a listing of income received after his termination as instructed by the Court (see Transcript at 108). Accordingly, the Court will enter an Order on the issue of liability, but will defer ruling on appropriate

relief until the parties submit appropriate information upon which the Court can calculate damages.

Plaintiff will have fifteen (15) days from the date of this Memorandum to file additional submissions with regard to appropriate damages, and defendant shall have ten (10) days thereafter to respond.

Dated this 27th day of December, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

OPPOSITION

BRIEF

(2)

No. 86-1431

In the Supreme Court of the United States

OCTOBER TERM, 1986

THEODORE J. LOEFFLER, PETITIONER

v.

PRESTON R. TISCH, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1431

THEODORE J. LOEFFLER, PETITIONER

v.

PRESTON R. TISCH, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner seeks review of a holding that prejudgment interest may not be awarded against the United States Postal Service (USPS) in employment discrimination cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

1. After a bench trial in the United States District Court for the Eastern District of Missouri, petitioner, a male employee of USPS, prevailed in his claim that he had been discharged as a result of gender discrimination. The district court accordingly ordered petitioner reinstated with backpay (Pet. App. A26-A34). But the court held that the United States' sovereign immunity foreclosed an award of prejudgment interest on this backpay award (*id.* at A21).

On appeal, a panel of the Eighth Circuit, relying on the panel opinion in *Cross* v. *United States Postal Service*, 733 F.2d 1327, aff'd en banc by an equally divided court, 733

F.2d 1332 (1984), cert. denied, 470 U.S. 1051 (1985), affirmed the denial of prejudgment interest against USPS, holding it barred by sovereign immunity (Pet. App. A19-A20). The panel's ruling was in turn affirmed by a six-to-five vote of the en banc Eighth Circuit (*id.* at A1-A11).

The majority adopted the reasoning of the *Cross* panel, adding that its "conclusion is strongly reinforced by the recent decision of the Supreme Court in *Library of Congress* v. *Shaw*, [No. 85-54 (July 1, 1986)], holding that Congress, in enacting Title VII, did not waive the government's immunity from interest" (Pet. App. A2). The court of appeals found it irrelevant in this case that Congress has permitted USPS to "sue and be sued in its official name" (39 U.S.C. 401(1)); the court noted that petitioner's action "was not brought under the sue and be sued clause of the Postal Reorganization Act. Instead it was brought under Title VII as amended in 1972." Pet. App. A4. And the court explained that "Congress explicitly treated the Postal Service as a federal agency when it amended Title VII in 1972 to make the Postal Service and other federal agencies amenable to suit under Title VII" (*id.* at A7). The court therefore expressly declined to follow the Eleventh Circuit's decision in *Nagy* v. *United States Postal Service*, 773 F.2d 1190 (1985), which held USPS liable for interest on Title VII backpay awards.

Judge Arnold, joined by four other judges, dissented. He noted that the en banc court's holding "creates a square conflict" with *Nagy* v. *United States Postal Service*, *supra* (Pet. App. A9). And while he observed that "there are respects, and important ones, in which the Postal Service is unlike a private employer," Judge Arnold doubted "that sovereign immunity with regard to an ordinary incident of relief in a civil action is one of those differences" (*id.* at A10).

2. We believe that the court of appeals applied the proper analysis and reached the correct result in this case. As both the majority and the dissent noted, however, the holding below squarely conflicts with the Eleventh Circuit's decision in *Nagy* v. *United States Postal Service, supra*, which looked to the "sue and be sued" clause of 39 U.S.C. 401(1) in holding prejudgment interest available against USPS.[1] Given the volume of Title VII and related litigation in which USPS is involved nationwide,[2] this conflict is of practical importance. While USPS prevails in the vast majority of these cases, the availability of prejudgment interest inevitably will result in significant added liability. Equally important, the split in the circuits has created a disparity in the remedies available to USPS employees in different locations. For these reasons, review by this Court is warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

JUNE 1987

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[1]The decision below is also in tension with *Hall* v. *Bolger*, 768 F.2d 1148 (9th Cir. 1985), which permitted interest on an award of attorneys' fees against USPS under Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794a, which incorporates by reference the remedial provisions of Title VII.

[2]USPS advises us that there currently are 337 employment discrimination cases pending against it in the district courts and courts of appeals.

PETITIONER'S

BRIEF

No. 86-1431

In The
Supreme Court of the United States
October Term, 1986

THEODORE J. LOEFFLER,
Petitioner,

vs.

PRESTON R. TISCH, POSTMASTER GENERAL OF THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the United States Postal Service, created by an act of Congress in 1970 and therein authorized "to sue and be sued," 39 U.S.C. § 401(1), is immunized against an award of prejudgment interest in a suit brought pursuant to the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e, *et seq.*

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The Opinion of the United States Court of Appeals for the Eighth Circuit *En Banc* is reported at 806 F.2d 817 (8th Cir. 1986) and is reprinted in Petitioner's Petition for Writ of Certiorari in the Appendix at page A-1.

The three-judge panel opinion preceding the *En Banc* decision below is reported at 780 F.2d 1365 (8th Cir. 1985) and is reprinted in Petitioner's Petition for Writ of Certiorari in the Appendix at page A-12.

The opinion of the United States District Court for the Eastern District of Missouri is unreported but is reprinted in Petitioner's Petition for Writ of Certiorari in the Appendix at page A-26.

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JURISDICTION

On December 8, 1986, the United States Court of Appeals for the Eighth Circuit issued it order affirming the District Court's judgment denying prejudgment interest.

A Petition for Writ of Certiorari was filed by Petitioner herein on March 5, 1987. Pursuant to 28 U.S.C. § 2101(c), the Petition was timely filed. Certiorari was granted on June 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTE INVOLVED

The Postal Reorganization Act of 1970 provides in relevant part, as follows at 39 U.S.C. § 401(1):

The Postal Service shall have the following general powers:

1. To sue and be sued in its official name; . . . . "

STATEMENT OF THE CASE

Petitioner Loeffler is a male rural carrier who prevailed in the district court on his claim of reverse sex discrimination against the United States Postal Service under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16. The district court found that the Postal Service unlawfully discharged him because of his sex, ostensibly for conduct which female rural carriers openly engaged in without suffering like discipline.

The court awarded Loeffler reinstatement, back pay of $91,871.00, attorney's fees and expenses but denied him prejudgment interest on his back pay, holding that the Postal Service was shielded by the cloak of sovereign immunity from an award of prejudgment interest under Title VII.

A panel of the United States Court of Appeals for the Eighth Circuit upheld the denial of prejudgment interest on the basis of sovereign immunity. Thereafter, a Rehearing *En Banc* was granted and the Court of Appeals, in a 6 to 5 opinion, affirmed the denial of prejudgment interest. The Court *En Banc* reasoned that, when the Postal Reorganization Act was passed in 1970, creating the Postal Service and subjecting it to a "sue and be sued" clause, sovereign immunity was waived. However the waiver did not reach Title VII, because in 1970, Title VII did not extend to federal instrumentalities, including the Postal Service. Later, in 1972, when Congress amended Title VII to reach the federal government, it did not directly speak to the question of interest. Therefore, the court reasoned, immunity remains in effect to bar interest awards.

This Court granted certiorari to review the issue of whether or not the United State Postal Service, created

by an act of Congress in 1970 and therein authorized to "sue and be sued," is immune to an award of prejudgment interest in a suit under Title VII.

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SUMMARY OF THE ARGUMENT

When Congress authorizes a federal agency to "sue and be sued", it generally lacks sovereign immunity from its inception. This is particularly true for the United States Postal Service created by Congress in the Postal Reorganization Act of 1970, 39 U.S.C. §§ 401 *et seq.* (1982), to operate as a private commercial enterprise. To understand the scope of the Postal Service's broad waiver of immunity, it is necessary to focus on Congress' intent under the Postal Reorganization Act, not Title VII.

The Postal Reorganization Act's legislative history strongly supports the conclusion that Congress intended that the Postal Service be subject to the same costs of doing business as private commercial enterprise. In reorganizing the Postal Service, one of Congress' main goals was to bring its management efficiency up to the efficiency of a successful private industry. Because prejudgment interest is a catalyst to the settlement of meritorious claims, it will further Congress' goal of effective managerial decision-making within the Postal Service.

Prejudgment interest is a normal element of damages in employment discrimination cases. Therefore, a judgment in an employment discrimination case against the Postal Service is subject to an award of interest, because it occupies the same "non-sovereign" status as private employers. The "no-interest rule," which precludes

awards of interest against the government, simply does not apply to the Postal Service which does not possess sovereign status except for certain limited purposes such as tort claims and certain procedural aspects of suit. These exceptions are expressly spelled out in the Reorganization Act. No other limitations to the broad waiver can be inferred or read into the Postal Reorganization Act or Title VII.

Waivers of immunity effected by "sue and be sued" clauses must be liberally construed. The Supreme Court's "liberal construction rule", set out in *Federal Housing Administration v. Burr,* has been followed for decades by federal courts which interpreted the scope of "sue and be sued" clauses to allow prejudgment interest against federal "sue and be sued" agencies. This rule was most recently applied by the Court to the Postal Service in *Franchise Tax Board v. United States Postal Service* and should not be compromised by introducing a "no interest" limit to the broad waiver of immunity in the Postal Reorganization Act.

No Congressional purpose would be served by denying interest awards against the Postal Service. Such awards would not deplete the public treasury, because Congress has provided that all of the Postal Services liabilities are to be paid out of its own separate funds. The Postal Service is precisely the kind of enterprise which the Supreme Court recognized at footnote 5 of its opinion in *Library of Congress v. Shaw.* There, the Court noted that the requirement of an express waiver of sovereign immunity as to interest is inapplicable when "the government has cast off the cloak of sovereign immunity and assumed the status of a private commercial enterprise."

ARGUMENT

I. The Issue is the Scope of Congress' Waiver of the Postal Service's Immunity under the Postal Reorganization Act, Not Title VII.

The general rule is that the federal government, as sovereign, is immune from suit except when it consents to be sued. The government, however, may waive the immunity of the sovereign. The scope of the waiver determines the rights of the plaintiff and the jurisdiction of the courts to entertain a suit. *See United States v. Sherwood,* 312 U.S. 584 (1941).

The question presented by this case is whether or not Congress, in creating the Postal Service by enactment of the Postal Reorganization Act of 1970, and therein authorizing it to "sue and be sued," waived the Service's immunity to prejudgment interest under Title VII.

Congressional waivers of sovereign immunity can best be analyzed and interpreted by dividing them into two categories: "substantive" waivers and "status" waivers. A substantive waiver occurs when Congress enacts a statute permitting a particular cause of action to lie against the federal government in general. Rather than waiving sovereign immunity for one particular agency or instrumentality of the government, the substantive waiver applies generally to the "United States" which is usually the proper party defendant. The 1972 amendments to Title VII, Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e *et seq.,* represent one instance of substantive waiver, just as the Federal Tort Claims Act, P. L. No. 79-601, § 401, 60 Stat. 842 (1946) (codified as amended in

scattered sections of 28 U.S.C. (1982)), and a host of other statutes that open the door to litigants against the federal government for certain substantive causes of action.[1] These statutory waivers pierce the shield of sovereign immunity which is normally in place for most federal agencies.

The second category is that which this case presents, the status waiver, which is triggered when Congress charters a new agency and authorizes it to "sue and be sued" in its own name. The status of the agency as the "sovereign" is waived at its inception by the insertion in its charter of a "sue and be sued" clause. However, sovereign status may not be fully waived if Congress expressly limits the power to "sue and be sued" in the agency's charter. In status waiver cases, judgments are entered against agencies in their own names, and not the United States generally. *See Falls Riverway Realty v. City of Niagara Falls*, 754 F.2d 49, 55 (2d Cir. 1985) (citing *Federal Housing Administration v. Burr*, 309 U.S. 242, 250-51 (1940)). As a result, these agencies pay the judgments out of their own funds and not out of general treasury revenue. *See Johnson v. Secretary of and United States Department of Housing and Urban Development*, 710 F.2d 1130, 1138 (5th Cir. 1983); *Electric Corporation v. United States*, 647 F.2d 1082, 1084 (Ct. Cl. 1981). The

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1 *See*, e.g. Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* (1982 & Supp. II 1984); Backpay Act, 5 U.S.C. § 5596 (1982); Civil Rights Act of 1964, 28 U.S.C. § 1447 and 42 U.S.C. §§ 1971, 1975a, *et seq.*, 2000a *et seq.* (1982); Tucker Act, Ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.)

Postal Service is one such agency, authorized to "sue and be sued".[2] Its "sue and be sued" clause effects a broad waiver of sovereign immunity. Historically, federal courts have construed the scope of status waivers liberally to include the same suits and natural incidents thereof as are available against private entities.

Congress enacted a number of status waiver statutes during the New Deal era when it launched the federal government into the arena of private commercial enterprise and chartered several government corporations to restore the Nation's depressed economy.[3] *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940), is the seminal case in a trilogy of status waiver decisions handed down by the Supreme Court during this period of time. *See Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939); *Reconstruction Finance Corp. v. J. G.*

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2 Postal Reorganization Act of 1970, 39 U.S.C. § 401(1) (1982).

3 *See, e.g. Reconstruction Finance Corporation*, Ch. 8, § 1, 47 Stat. 5 (1932) (repealed 1957); *Federal Home Loan Bank*, 12 U.S.C.A. §§ 1421 *et seq.* (West 1957 and Supp. 1987); *Tennessee Valley Authority*, 16 U.S.C.A. §§ 831a *et seq.* (West 1985); *Federal Credit Union*, 12 U.S.C.A. §§ 1751 *et seq.* (West 1980 and Supp. 1987); *Federal Mortgage Corporation*, Ch. 7, § 1, 48 Stat. 344 (1934) (repealed 1961); *Federal Housing Administration*, Ch. 847, § 1, 48 Stat. 1246 (1934) (current version at 12 U.S.C.A. §§ 1702 *et seq.* (West 1980 and Supp. 1987); *Federal Savings & Loan Insurance Corporation*, 12 U.S.C.A. § 1725 (West 1980 and Supp. 1987); *United States Housing Authority*, Ch. 896, § 1, 50 Stat. 888 (1937) (current version at 42 U.S.C.A. §§ 1437 *et seq.* (West 1978 and Supp. 1987)); *Federal Deposit Insurance Corporation*, Ch. 89, § 8, 48 Stat. 168 (1933) (current version at 12 U.S.C.A. §§ 1811 *et seq.* (West 1980 and Supp. 1987)); *See Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U.S. 381, 390 n. 3 (1939) (comprehensive list of statutes containing "sue and be sued" clauses).

Menihen Corp., 312 U.S. 81 (1941). In these cases, the Court developed principles governing interpretation of the scope of "sue and be sued" clauses. The Court declared that an agency does not possess sovereign immunity merely because it does the government's work and immunity is not readily implied in the face of a "sue and be sued" clause. *See Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U.S. at 388-89.

The Court's decision liberally construing "sue and be sued" clauses stated as follows:

> [W]e start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued", it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that *certain types of suits* are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, *it must be presumed* that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued", that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

> Clearly the words "sue and be sued" in their normal connotation embrace all civil process incident to the commencement or continuance of legal proceedings.

Federal Housing Administration v. Burr, 309 U.S. at 242 (emphasis added) (citations and footnote omitted) (quoted with approval in *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 517-18 (1984)).

In *Federal Housing Administration v. Burr*, the Court characterized the "sue and be sued" clause in the enabling statute of the Federal Housing Administration as a broad waiver of immunity, stripping the agency of its status as the sovereign and placing it in the same position as a private commercial enterprise. Any limits to the broad waiver must be expressed in the enabling statute and no limitations to the waiver will be inferred unless such limitations appear to be consistent with the "plain" intent of Congress.

The liberal construction rule has often been applied by the federal courts in broadly interpreting the scope of "sue and be sued" clauses in the charters of federal agencies.[4] A general waiver of sovereign immunity renders

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[4] *Active Fire Sprinkler Corp. v. United States Postal Serv.*, 811 F.2d 747 (2d Cir. 1987); *R & R Farm Enter., Inc. v. Federal Crop Ins. Corp.*, 788 F.2d 1148 (5th Cir. 1986); *Hall v. Bolger*, 768 F.2d 1148 (9th Cir. 1985); *Nagy v. United States Postal Serv.*, 773 F.2d 1190 (11th Cir. 1985); *Sportique Fashions, Inc. v. Sullivan*, 597 F.2d 664 (9th Cir. 1979); *Associates Fin. Servs. of Am., Inc. v. Robinson*, 528 F.2d 1 (5th Cir. 1978); *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462 (3d Cir. 1977); *North New York Sav. Bank v. Federal Sav. &*

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the agency liable for the "natural and appropriate incidents of legal proceedings" and interest is included in that category. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U.S. 81, 85 (1941); *Milner v. Bolger*, 546 F. Supp. 375, 382 (E.D. Cal. 1982). In following the liberal construction rule of *Federal Housing Administration v. Burr*, the federal courts have routinely allowed recovery of prejudgment interest against "sue and be sued" agencies as a normal incident of relief where the amount recoverable is liquidated.[5]

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Loan Ins. Corp., 515 F.2d 1355 (D.C. Cir. 1975); *White v. Bloomberg*, 501 F.2d 1379 (4th Cir. 1974); *Bituminous Cas. Corp. v. Lynn*, 503 F.2d 636 (6th Cir. 1974); *Kennedy Elec. Co. v. United States Postal Serv.*, 508 F.2d 954 (10th Cir. 1974); *K.T.A. v. Abramson*, 275 F.2d 771 (10th Cir. 1960); *United States v. Edgerton & Sons, Inc.*, 178 F.2d 763 (2d Cir. 1949); *Lutz v. United States Postal Serv.*, 538 F.Supp. 1129 (E.D. N.Y. 1982); *New York Guardian Mortgage Corp. v. Cleland*, 473 F. Supp. 422 (S.D. N.Y. 1979); *United States v. Mill Ass'n Inc.*, 480 F. Supp. 3 (E.D. N.Y. 1978); *Matter of Townsend*, 348 F. Supp. 1284 (W.D. Mo. 1972); *Asheville Mica Co. v. Commodity Credit Corp.*, 239 F. Supp. 383 (S.D. N.Y. 1965); *Hooten v. Civil Air Patrol*, 161 F. Supp. 478 (E.D. Wis. 1958); *Choy v. Farragut Gardens*, 131 F. Supp. 609 (S.D. N.Y. 1955).

5 *National Home for the Disabled Volunteer Soldiers v. Parrish*, 229 U.S. 494 (1913) (interest allowed against Home that has powers to sue and be sued. No specific expressed restriction of interest mentioned in the statute creating the Home.); *Standard Oil v. United States*, 267 U.S. 76 (1925) (When U.S. went into insurance business and provided that it could be sued, it accepted the ordinary incidents of suits in such business including prejudgment interest.); *Nagy v. United States Postal Serv.*, 773 F.2d 1190 (11th Cir. 1985) (Prejudgment interest awarded because a "sue and be sued" clause creates a presumption of waiver of sovereign immunity for all purposes. Thus, barrier to award of prejudgment interest was lifted.); *Kennedy Elec. v. United*

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Standard Oil v. United States, 267 U.S. 76 (1925) is one of the earliest Supreme Court decisions concerning a "sue and be sued" agency and prejudgment interest. In *Standard Oil*, Congress had enacted the War Risk Act, Ch.

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States Postal Serv., 508 F.2d 954 (10th Cir. 1974) (breach of contract action in which the amount due to plaintiff was readily ascertainable. The fact that liability was disputed does not preclude prejudgment interest.); *New York Guardian Mortgage v. Cleland*, 473 F. Supp. 422 (S.D. N.Y. 1979) (Veteran Administrator given power to "sue and be sued" when embarking on a business venture such as issuing insurance, accepts equal footing with private parties as to the usual incidents of suit, including the award of interest.); *Asheville Mica Co. v. Commodity Credit Corp.*, 239 F. Supp. 383 (S.D. N.Y. 1965) (Unless congressional intent granting immunity is shown, immunity from interest is not extended to government corporations authorized to engage in commercial transactions with the public.); *Ferguson v. Union Nat. Bank of Clarksburg*, 126 F.2d 753 (4th Cir. 1942) (Court allowed recovery of interest against Administrator stating that when the United States agreed to be sued as an insurer, the recovery of interest for delay in payment was proper since interest is an ordinary incident of a suit on an insurance contract.); *United States v. Mill Ass'n, Inc.*, 480 F.Supp. 3 (E.D. N.Y. 1978) (Court allowed recovery of prejudgment interest against Department of Housing and Urban Development holding that the usual rule that the United States cannot be subjected to the payment of interest unless authorized is not necessarily applicable when the defendant is a separate governmental agency.); *North New York Sav. Bank v. Federal Sav. & Loan Ins. Corp.*, 515 F.2d 1355 (D.C. Cir. 1975) (The Federal Savings and Loan Insurance Corporation was given the power to sue and be sued by Congress. It is a separate corporate body in the insurance business and is assumed to have accepted the ordinary incidents of suits in such a business, which include prejudgment interest.); *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979) (Prejudgment interest awarded against the National Flood Insurers

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293, 38 Stat. 711, 712 (1914) (current version at 38 U.S.C., §§ 701 *et seq.* (1982)) creating within the Department of the Treasury a Bureau of War Risk Insurance with the capacity to be sued if there was a dispute over an insurance claim. Congress had launched the Bureau of War Risk Insurance into the insurance business, fully intending the agency to compete in the private market for profit.

> When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.

Standard Oil v. United States, **267 U.S. at 79.**

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Association (NFIA) because it is not an arm of the sovereign, but an association of private insurers. Even though the government has a financial stake in the program that is not enough to cloak the NFIA in the robe of sovereign immunity from awards of interest.); *Bituminous Cas. Corp. v. Lynn,* 503 F.2d 636 (6th Cir. 1974) (Interest awarded against Department of Housing and Urban Development because it had embarked on a business venture with the power to sue and be sued. Thus, the United States places itself on equal footing with private parties as to the usual incidents of suits, which include prejudgment interest.); *George Hyman v. Washington Metro Transit Auth.,* 816 F.2d 753 (D.C. Cir. 1987) (Although the court refused to award prejudgment interest because of Virginia law forbidding it, the court agreed with the federal rule that when government instrumentalities engage primarily in commercial activities, the "sue and be sued" clause waives immunity both from suit and the common incidents thereof, including awards of prejudgment interest.); *Schapiro v. Kansas Pub. Employees Retirement Sys.,* 216 Kan. 353, 532 P.2d 1081 (1975) (Where legislature consents that one of its agencies may be sued on express contracts, the waiver of sovereign immunity should extend to every aspect of its contractual liability, including the recovery of interest.)

These factors persuaded the Supreme Court to permit an award of prejudgment interest against the United States.[6]

The liberal construction rule regarding the scope of the "sue and be sued" clauses in the charters of federal agencies is not without exception. Under the exceptions outlined in *Federal Housing Administration v. Burr,* prejudgment interest would be foreclosed if:

1. The award of prejudgment interest is inconsistent with the statutory or constitutional scheme;

2. Denial of prejudgment interest is necessary to avoid grave interference with the performance of a governmental function; or

3. It was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. *See Federal Housing Administration v. Burr,* 309 U.S. at 245; *Franchise Tax Board v. United States Postal Service,* 467 U.S. at 519. For example, with respect to the Federal Deposit Insurance Corporation, the courts have recognized that Congress intended the "sue and be sued" clause in its Charter to be narrowly construed with respect to certain of its governmental, as opposed to its proprietary functions.[7] The courts have not, however, noted such distinc-

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[6] *Standard Oil v. United States,* is unusual in that the Bureau of War Risk Insurance was not authorized to sue and be sued in its own name, leaving the United States as the party defendant. In most status waiver cases, Congress authorizes the agency to be sued in its official name. Thus, any judgment against the agency is not a judgment against the United States but against the agency itself.

[7] *See, e.g., Federal Deposit Ins. Corp. v. Harrison,* 735 F.2d 408 (11th Cir. 1984). ("Proprietary governmental functions

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tions in the legislative history of the Postal Reorganization Act. The overwhelming majority of status waiver decisions regarding "sue and be sued" agencies have allowed prejudgment interest as a normal incident of recovery.[8]

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include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular governmental agency. Whereas [when the Federal Deposit Insurance Corporation (FDIC) acts in its] sovereign role, the government carries out unique governmental functions for the benefit of the whole public[.]" *Id.* at 411.); *Federal Deposit Ins. Corp. v. Harrison,* 735 F.2d 408 (when FDIC acted as a receiver and liqudiating agent for a failed bank it stands in the shoes of the insolvent bank, and thus, performed the same function as any assuming bank and should be treated no differently.); *Philadelphia Gear Corp. v. Federal Deposit Ins. Corp.,* 752 F.2d 1131 (10th Cir. 1984) (Court refused to allow the award of prejudgment interest against the FDIC acting in its capacity as an insurer for delays in paying insurance claims, since Congress had expressly recognized such delays would occur and thereby did not waive FDIC's immunity to prejudgment interest.); *Federal Deposit Ins. Corp. v. Glickman,* 450 F.2d 416 (9th Cir. 1971) ("When the FDIC acts in its capacity as a federal insurer it is immune from suit." *Id.* at 418.).

[8] The exception to this general rule is cases handed down by the Court of Claims. In suits against the government in the Court of Claims, the proper party defendant is the "United States" and not the agency in its official name. The Act of Congress which confers jurisdiction in the Court of Claims contains a provision which states, "Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. § 2516(a) (1982). Thus, the Court of Claims may only award interest against the government if the agency's enabling statute expressly provides for the award of interest. *See, e.g. Coley Prop. Corp. v. United States,* 593 F.2d 380 (Ct. Cl. 1979); *Butz Eng'g Corp. v. United States,* 204 Ct. Cl. 561, 499 F.2d 619 (1974). *See also, Milner v. Bolger,* 546 F. Supp. 375, 381 (E.D. Cal. 1982); *White v. Bloomberg,* 501 F.2d 1379, 1384, n.6 (4th Cir. 1974).

Citing the liberal construction rule of the trilogy headed by *Federal Housing Administration v. Burr,* the Eleventh Circuit has held that in Title VII cases, the Postal Service is not immunized from prejudgment interest. *Nagy v. United States Postal Service,* 773 F.2d 1190, 1193 (11th Cir. 1985). The *Nagy* court, also citing *Franchise Tax Board,* distinguished the Postal Service from other federal agencies with sovereign immunity because of the Reorganization Act's "sue and be sued" clause. This decision squarely conflicts with the holding of the Court of Appeals in this case in which a sharply divided court *en banc* has reached the opposite conclusion. *Loeffler v. Tisch,* 806 F.2d 817 (8th Cir. 1986) (*en banc,* decided 6-5). *See Cross v. United States Postal Service,* 733 F.2d 1327, *aff'd en banc by an equally divided court,* 733 F.2d 1322 (8th Cir. 1984), *cert. denied,* 470 U.S. 1051 (1985). The Fourth Circuit in *White v. Bloomberg,* 501 F.2d 1379 (4th Cir. 1974) cites *Federal Housing Administration v. Burr* and the "sue and be sued" clause of the Postal Reorganization Act in support of its holding that the Postal Service is not immune from post-judgment interest under the Backpay Act. Additionally, the Ninth Circuit has allowed post-judgment interest on an award of attorney's fees against the Postal Service under 29 U.S.C. § 791, holding that interest was not barred by sovereign immunity because of the Reorganization Act's broad waiver. *Hall v. Bolger,* 768 F.2d 1148, 1151 (9th Cir. 1985). Consequently, the liberal construction rule established by the Supreme Court during the New Deal era is well-settled and has consistently and recently served as authority for allowing awards of interest against federal agencies engaged in private enterprise, including the Postal Service.

In contrast to the liberal construction of "sue and be sued" clauses, the federal courts have restrictively interpreted substantive waivers of immunity by Congress. These substantive waivers do not focus on any particular agency of the government. Rather, they provide litigants with access to the "United States" for certain causes of action or incidents of suit previously unavailable because of sovereign immunity. Substantive waiver legislation abounds in the codified laws of the United States.[9]

In *Boston Sand v. United States,* 278 U.S. 41 (1928), the Court set the narrowest possible boundaries for interpreting the scope of substantive waivers. The case concerned a waiver of sovereign immunity for libel in admiralty to recover damages done to a private ship by a collision with a United States destroyer.[10] Although the statute held the United States liable the "same as a private party", the Court declined to infer from this language that Congress intended the United States to be liable for interest as a normal incident of suit.

More recently, the Court reaffirmed the narrow scope of substantive waivers in *Library of Congress v. Shaw,* 106 S.Ct. 2957 (1986) when it held that Title VII does not subject the United States to liability for prejudgment interest

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9 *See, e.g.* Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e *et seq.* (1982); Federal Tort Claims Act, Pub. L. No. 79-601, § 401, 60 Stat. 842, 843-47 (1946) (codified as amended in scattered sections of 28 U.S.C. (1982)); Contract Disputes Act of 1978, 42 U.S.C. §§ 602 *et seq.* (1982 & Supp. II 1984); Backpay Act, 5 U.S.C. § 5596 (1982); Tucker Act, Ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.); Civil Rights Act of 1964, 28 U.S.C. § 1447 and 42 U.S.C. §§ 1971, 1975a *et seq.*, §§ 2000a *et seq.* (1982).

10 By authority of the Act of May 15, 1922, ch. 192, 42 stat. 1590 (1922).

despite the statute's wording that "the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k). Again, the Court declined to infer liability in the absence of express language permitting recovery of interest within the substantive waiver statute, Title VII. The vast majority of federal courts have followed the *Boston Sand* principle of limiting the scope of substantive waivers to the express statutory language and not permitting interest to be recovered against the "United States" absent express statutory permission.[11]

This case, however, concerns a status waiver and not a substantive waiver of sovereign immunity. But for the "sue and be sued" clause in the charter of the Postal Service, and the legislative history of the Postal Reorganization Act, this issue would have been governed by the holding in *Library of Congress v. Shaw* that Title VII of the 1964 Civil Rights Act does not waive the government's traditional immunity from interest. The resolution of the interest issue in this case, however, turns upon an analysis of Congress' intent regarding the Postal Reorganization Act and the "sue and be sued" clause in the charter of the Postal Service. The Court must now determine the scope of Congress' waiver of the Postal Service's "sovereign status" in the "sued and be sued" clause.

Adopting the reasoning of the majority opinion in *Cross v. United States Postal Service,*[12] the court below

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11 *See, e.g. Laird v. Nelms,* 406 U.S. 797 (1972), *Lehman v. Nakshian,* 453 U.S. 156 (1981); *Blake v. Califano,* 626 F.2d 891 (D.C. Cir. 1980); *Bor-Son Building Corp. v. Heller,* 572 F.2d 174 (8th Cir. 1978); *Van Winkle v. McLucas,* 537 F.2d 246 (6th Cir. 1976), *cert. denied,* 429 U.S. 1093 (1977).

12 733 F.2d 1327, *aff'd en banc by an equally divided court,* 733 F.2d 1332 (8th Cir. 1984), *cert. denied,* 470 U.S. 1051 (1985).

based its holding upon an erroneous premise: "If a waiver of immunity with respect to interest is to be found at all, it must be found in the statute that give rise to the cause of action."[13] In other words, the court determined the scope of a status waiver, the Postal Reorganization Act, by looking to Congress' intent regarding a substantive waiver, Title VII. This erroneous premise was rejected by the Eleventh Circuit in *Nagy:*

> Under that view, a general waiver of sovereign immunity, such as Section 401(1), would have no effect on the analysis of this issue. We find the dissent in *Cross* more persuasive and respectfully decline to follow the majority's opinion.

Nagy v. United States Postal Service, 773 F.2d 1190, 1192, n.2 (11th Cir. 1985).

The fallacy of the premise is best articulated by the court in *Milner v. Bolger:*

> Concluding that the Postal Service is liable for interest on judgments will in no way undermine or distort the rationale behind Title VII, but concluding that the Postal Service is not liable for interest on Title VII judgments would in fact distort the provisions of 39 U.S.C. § 401(1). To adopt the argument of the Postal Service would require this court to find that Congress, by including the Postal Service within the ambit of Title VII, reinstated the sovereign immunity it had previously waived. Such a conclusion cannot be drawn from inference, and nothing in the statute or legislative history has been suggested to support said argument.

Milner v. Bolger, 546 F.Supp. 375, 383 (E.D. Cal. 1982).

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[13] *Id.* at 1329 (citations omitted).

Proper analysis of this issue must take into consideration Congress' intent when it created the Postal Service in 1970. At that time, the Postal Service was stripped of its sovereign status. The 1972 Amendments to Title VII cannot logically be read to reinstate sovereign immunity to the Postal Service with respect to prejudgment interest which is a normal incident of recovery in employment discrimination actions.

The *Loeffler* majority opinion cannot be reconciled with *Federal Housing Administration v. Burr* and *Franchise Tax Board v. United States Postal Service.* Indeed, were the majority rationale the rule of law, each of the above cases would have been decided differently. For in both *Franchise Tax Board* and *Federal Housing Administration v. Burr,* the plaintiffs did not base their actions on the statutes creating the agencies but on state laws. State law cannot effect a waiver of the federal agency's immunity. Yet, this Court held that the statutes creating the agencies broadly waived their immunity and made them liable to all civil process incidental to the commencement of legal proceedings. *Federal Housing Administration v. Burr,* 309 U.S. at 242. In sum, the *Loeffler* majority opinion is at odds with well-settled authority cited above, holding that status waivers of immunity such as that expressed in the Postal Reorganization Act are to be broadly and liberally applied and limitations on the broad waiver may not be inferred.

II. Congress Intended that the Postal Service Function As a Private, Commercial Enterprise.

The Postal Service is a "sue and be sued" agency which Congress created pursuant to the Postal Reorganiza-

tion Act of 1970, 39 U.S.C. §§ 101 *et seq.* (1982 & Supp. II, 1984 & Supp. III, 1985). This Act was prompted by a consensus that the old postal system was in need of drastic reform.[14] The Post Office Department, as a result of political influence-peddling, had evolved into a bureaucratic nightmare, literally paralyzed by mounting deficits and inefficient management.

In the late sixties, the Chicago Post Office nearly stopped functioning, prompting President Johnson to appoint a Special Commission, headed by former head of AT&T, Frederick R. Kappel, to study the problems, recommend necessary reforms and to report upon the desirability of transferring postal delivery functions to a government corporation. 116 Cong. Rec. 19,844 (1970). After completing the study, The President's Commission cited three causes of management paralysis in the Post Office:

> "1. Because it is financed in part from the Federal Treasury, the Post Office is enmeshed in the Federal budgetary process, and thus cannot be managed as its business character demands.
>
> 2. Because of statutory constraints, the nominal managers of the system cannot make the adaptation required by a fast-moving economy.
>
> 3. Because of the system for selecting postal managers, normal line relationships between them and top management are impossible."

President's Commission on Postal Reorganization, Toward Postal Excellence, 35 (June 1968).

The report identified "effective management leadership" as the key to solving these problems.

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[14] 116 Cong. Rec. 19,844 (1970).

> [The Postal Service] needs a management free to manage with all that entails: Authority matched with responsibility; a sound cost accounting and an information system so that they know where they have been and where they are going.

Id. at 63. The Commission stressed the need to allow the new Postal Service independence in its own management and finances.

Thus, through the Postal Reorganization Act of 1970, Congress set out to purge political influence from the postal system by abolishing the Post Office and replacing it with an independent, self-financed agency of the Executive Branch, the United States Postal Service. Congress did so, hoping that the introduction of private corporate incentives and management techniques would enable the postal service to sustain itself.[15] "Top management must be given authority, consistent with its responsibilities to provide an efficient and economical postal system." 1970 U.S. Code Cong. & Admin. News, 3649, 3653.

Congress patterned the management structure of the new Postal Service on the private corporate model, with a politically balanced nine member Board of Governors determining policy and the Postmaster General acting as the chief managing officer. 39 U.S.C. §§ 201 *et seq.* (1982). 116 Cong. Rec. 26,957, 27,597, 26,603 (1970). The Board, not the President, would select the Postmaster General and also have the sole power to remove him. Management officials were no longer politically appointed but were

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[15] 116 Cong. Rec. 19,850 (1970). *See* Priest, *The History of the Postal Monopoly in the United States,* 18 J. L. & Econ., 33, 68 (1975).

to be hired, promoted and fired solely on the basis of merit and performance. 116 Cong. Rec. 26,957 (1970).

Financially, Congress intended the Postal Service to eventually become self-supporting.[16] 39 U.S.C. § 2401 (1982). Congress created a special Postal Service Fund, a revolving fund in the Treasury of the United States, "available to the Postal Service without fiscal-year limitation to carry out the purposes, functions, and powers authorized by this title." 39 U.S.C. § 2003. In addition, Congress granted the Postal Service broad financing and borrowing powers. 39 U.S.C. § 2005.

Although Congress provided for a thirteen-year transition period in which some monies would be needed from the General Treasury to maintain certain public service functions, its goal was to reduce public appropriations to zero after the transition time. 116 Cong. Rec. 27,606 (1970). Congress also authorized the Postal Service to issue up to 10 billion dollars in revenue bonds, providing added flexibility to the Service's borrowing power. Thus, although management would get some revenue from public funds, such appropriations were available only for a limited time and only for certain governmental use of the mails and for certain types of public service mail. The remainder of postal revenues would come from charges for services.

Financial independence was seen as an encouragement to effective management decision-making.[17] The Postal Rate Commission, established by Congress along with the

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16 116 Cong. Rec. 19,857 (1970).

17 *See Note, The Postal Reorganization Act: A Case Study of Regulated Industry Reform*, 58 Va. L. Rev. 1030, 1044-46 (1972).

Postal Service, is authorized to challenge postal rates which exceed the amount needed by an "honest, efficient and economical management to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States." 39 U.S.C. § 3621 (1982). Thus, the Postal Rate Commission had great potential to effectively pressure postal management into efficient conduct.[18] Congress built into the reorganization a number of incentives to encourage the same effective decision-making found in successful private corporations.

In addition to management structure and financial independence, Congress also modeled Postal Service labor and employee relations after private industry. Its goal was to improve the salary and working conditions of postal employees to compete with the private sector. *See* 39 U.S.C. §§ 101, 103 (1980). Collective bargaining procedures, as in private industry, would govern wages, hours and fringe benefits, subject to the National Labor Relations Act with certain limited exceptions including the prohibition of strikes.[19] Section 410 of the Act also frees the Postal Service from most federal laws and regulations imposed upon other federal agencies with a few exceptions in the area of personnel. Congress intended to preserve for the Postal Service as great a degree of independence as possible. 116 Cong. Rec. 27,607 (1970). As Senator McGee remarked in introducing the Senate version of the Act:

> Delivering mail is simply not in the same category of policy making and program development as foreign policy, national defense, housing, highway construc-

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18 *See Id.* at 1049.

19 116 Cong. Rec. 20,226, 27,602 (1970).

tion or health and education assistance to state and local governments. *It is an essential business-oriented service.* The committee has no intention of establishing any postal system which does not have a direct and continuing responsibility to the people and to Congress, but we do believe that its role can be fulfilled with a greater degree of efficiency if it is removed from the ordinary channels, administrative controls, and legislative restrictions of other agencies in the Executive Branch.

116 Cong. Rec. 21,709 (1970) (Emphasis added).

Finally, Congress gave the Postal Service a host of other powers typically possessed by private corporations, which underscore the independence of the new agency: "including the power to make and perform contracts; to keep its own system of accounts; to buy, sell, lease, and operate property; to accept gifts; and to compromise claims against it."[20]

An examination of the clear legislative history of the Postal Reorganization Act compels the conclusion that Congress intended the newly created Postal Service to operate as a private commercial enterprise.[21] Virtually every federal circuit agrees that with the Postal Reorganization Act, Congress intended to launch the Postal Service into the commercial world.[22]

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20 *Cross v. United States Postal Service*, 733 F.2d 1327, 1332, *aff'd en banc by an equally divided court*, 733 F.2d 1332 (8th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (Arnold, J., dissenting from panel opinion). *See* 39 U.S.C. §§ 401(3)-(9).

21 116 Cong. Rec. 20,227, 27,603 (1970).

22 *See Kuzma v. United States Postal Serv.*, 798 F.2d 29, 31 (3d Cir. 1986); *People's Gas Co. v. United States Postal Serv.*, 658 F.2d 1182, 1201-02 (7th Cir. 1981); *National Ass'n. of*

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The Postal Service is precisely the kind of enterprise the Supreme Court recognized in footnote five of *Library of Congress v. Shaw:* "The no-interest rule is similarly inapplicable where the government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." 106 S.Ct. at 2963 n.5.

With the "sue and be used" clause, Congress cast off the cloak of sovereign immunity for the Postal Service, intending it to be financially independent of the United States Treasury, under similar management incentives and labor relation rules as private industry.

It therefore follows logically that Congress would have intended that the Postal Service function as nearly as possible under the same economic risks as private enterprise. Prejudgment interest is always a consideration in private corporate decision-making. Choices must be made in contract and employment disputes regarding whether to settle, compromise or litigate.[23] Interest is a factor in the de-

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Postal Supervisors v. United States Postal Serv., 602 F.2d 420 431 (D.C. Cir. 1979); *Beneficial Finance Co. v. Dallas*, 571 F.2d 125, 128 (2d Cir. 1978); *Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462, 464 (3d Cir. 1977); *May Dep't Stores v. Williamson*, 549 F.2d 1147, 1148 (8th Cir. 1977); *Standard Oil v. Starks*, 528 F.2d 201, 202 (7th Cir. 1976); *Kennedy Elec. Co. v. United States Postal Serv.*, 508 F.2d 954, 957 (10th Cir. 1974); *Milner v. Bolger*, 546 F. Supp. 375, 377-78 (E.D. Ca. 1982); *Cross v. United States Postal Serv.*, 733 F.2d 1327, 1331, *aff'd en banc by an equally divided court*, 733 F.2d 1332 (8th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). (Arnold, J., dissenting from panel opinion).

23 In addition to the power to "sue and be sued" Congress, in 401 grant the power to "settle and compromise claims by or against it"[.] 39 U.S.C. § 401(8) (1982).

cision-making process which can encourage settlement of meritorious claims and discourage prolonged litigation. *See General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656 n.10 (1983).

If "effective management leadership" includes consideration of prejudgment interest in decisions regarding settlement of meritorious claims, then allowing litigants to recover interest against the Postal Service furthers Congress' main goal in the reorganization. This was the reasoning of the court in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982), in which the court held that the Postal Service was not immune from the doctrine of equitable estoppel in a case involving representations by a postal employee to a potential "Express Mail" customer. Citing the competitive nature of the agency's business, the court saw "no reason why the Postal Service should not be held to the same commercial standards in dealing with its customers as would an analogous private entity." *Id.* at 1169. The court then stated:

> We think we would do the Postal Service no competitive favor by conferring on it an absolute immunity from estoppel in the circumstances of this case. As we have suggested, no threat to the public fisc is directly involved. But the dubious privilege of not being bound by the representations of its employees in routine commercial transactions would seem to further reflect on the Service's already tarnished reputation as a provider of regular and express mail service.

Id. Just as the Postal Service must face the same competitive risks and challenges as private enterprise in dealing with its customers, so too must it face up to these same pressures and obligations in dealing with its own employees.

Had prejudgment interest been an economic factor in the decision-making process, this case might long ago have been settled. Instead, the Postal Service enjoyed the free use of over Ninety Thousand Dollars of Mr. Loeffler's back wages for five long years during which time the District Court's findings, based primarily on the resolution of credibility issues, were appealed and subsequently affirmed. Hiding behind the immunity shield, the Postal Service management has so far paid significantly less than its private counterparts for poor decision-making. Immunity, in this case has impeded the quality of management leadership and frustrated Congress' intent to bring the Postal Service's management into the same market place as other private enterprise.

Furthermore, it was against the backdrop of the well-established "liberal construction rule" that Congress created the Postal Service in 1970. Under the rule, the courts may not infer limitations where none explicitly exists in the broad waiver of immunity effected by the "sue and be sued" clause in the Postal Service's charter. This is particularly true with respect to the Postal Reorganization Act for two reasons. First, Congress expressed a clear intent that the Postal Service function as nearly as possible as a private commercial enterprise. Second, Congress *expressly* limited the broad waiver of immunity both substantively and procedurally in the Postal Reorganization Act in two main respects: (1) the applicability of the Federal Tort Claims Act and (2) procedural matters relating to suits against the United States. 39 U.S.C. § 409.

As the court stated in *Standard Oil Div. American Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975):

> These specific and isolated limitations indicate beyond doubt that the waiver to sue and be sued applied to all other litigation. *See KSK Jewelry Co. v. Chicago Sheraton Corp.*, 283 F. 2d 8, 11 (7th Cir. 1960); *White v. Bloomberg*, 501 F.2d 1379, 1386 (4th Cir. 1974); Sutherland, *Statutory Construction* Section 47.23.

Id. at 203. Had Congress intended further limitations on the broad waiver of sovereign immunity for the Postal Service, it most certainly would have expressed its intent within the enabling statute. It strains the "liberal construction rule" to infer limits on a broad waiver of immunity in the face of explicitly stated limitations within the enabling statute.[24]

The Supreme Court's most recent reaffirmation of the liberal construction rule with respect to the Postal Service is its decision in *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984) in which the scope of the "sue and be sued" clause in the 1970 charter of the Postal Service was broadly interpreted to include a garnishment action against the Postal Service. In *Franchise Tax Board*, the Court again embraced the liberal construction rule of *Federal Housing Administration v. Burr:*

> Congress has launched [the] Postal Service into the commercial world hence . . . not only must we liberally

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[24] Section 409(c) provides that the Federal Tort Claims Act shall apply to tort claims arising out of activities of the Postal Service. Section 410 itemizes those federal laws applicable to the Postal Service including Title VI of the Civil Rights Act of 1964. Title VII is absent from this list. The Senate version had contained a provision making Title VII applicable to the Postal Service, however, it was later deleted in the conference report. Title VII was later made applicable to the Postal Service in the 1972 amendments to Title VII. Equal Employment Opportunity Act 42 U.S.C. § 2000e-16 (1982).

> construe the 'sue and be sued' clause, but also we must *presume* that the Service's liability is the same as that of any other business.

467 U.S. at 519 (emphasis added). The Court characterized Congress' waiver of sovereign immunity of the Postal Service as "broader" than the status waiver in *Federal Housing Administration v. Burr. Id.* Furthermore, the Court noted that the "nearly universal conclusion of the lower federal courts has been that the Postal Reorganization Act constitutes a waiver of sovereign immunity." *Id.* at 519, n.12 (citations omitted). The Court's authority for the preceding statement includes *Milner v. Bolger,*[25] which held the Postal Service liable for interest under Title VII citing the "sue and be sued" clause in its charter.

The Postal Service's liability "is the same as that of any other business," and "Congress intended the Postal Service to be treated similarly to other self-sustaining ventures."[26] It logically follows that Congress intended the Postal Service be subject to prejudgment interest which is a normal incident of relief in employment suits. In *Federal Housing Administration v. Burr,* the Court states that the Federal Housing Administration had the came liability as private enterprise for "certain types of suit." If the Postal Service is liable for the same "types of suit," in this instance Title VII, then it should not be immune to normal elements of *damages,* such as prejudgment interest, incidental to the same "types of suit." *See Milner v. Bolger,* 546 F. Supp. 375, 382 (E.D. Cal. 1982).

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[25] 546 F. Supp. 375 (E.D. Cal. 1982).

[26] *Franchise Tax Board v. United States Postal Serv.*, 467 U.S. 512, 523 (1984).

As a policy matter, liberal construction of the "sue and be sued clause" in the Postal Reorganization Act furthers Congress' intent to launch the Postal Service into the world of private enterprise. The Postal System must be perceived by those with whom it does business not as "the government" with its bureaucratic entanglements, but as a business competitor, subject as nearly as possible to the same market pressures and liabilities as its private counterparts. It is more desirable to do business with an agency unshielded by governmental immunity. Ideally, all competitors, including federal agencies launched by Congress into private commercial enterprise, should operate under the same market pressures and play by the same rules of competition. Against the backdrop of the "liberal construction rule", Congress need not expressly itemize all causes of action, elements of damage and incidents of suit for which it intends an agency to be liable. Rather, with one broad sweep, Congress may effect the same result with insertion into the agency's charter of a "sue and be sued" clause.

The clause can also have prospective effect as to newly-enacted statutory protections such as Title VII. The court's decision below denies prospective effect to the "sue and be sued" clause for a normal element of damages, interest, in a remedy, Title VII, which became applicable to the Postal Service after its genesis. According to this reasoning, Congress would have to expressly state in each new remedial substantive waiver legislation that interest is available against identified federal instrumentalities which, by Acts of Congress, have assumed the status of private commercial enterprise. An affirmation of the Court of Appeals' decision in this case would seriously

undermine the liberal construction rule, placing Congress in an awkward position not only with respect to the Postal Service but also with respect to scores of other Federal instrumentalities authorized to "sue and be sued."[27]

The liberal construction rule, however, permits "sue and be sued" agencies to be sued under statutory remedies enacted after the agency was chartered. Here, had Congress not expressly in the Postal Reorganization Act exempted the Postal Service from Title VII, then under the liberal construction rule, the Postal Service would have been liable under Title VII back in 1970. When the 1972 Amendments to Title VII were passed extending Title VII jurisdiction to the Postal Service, the Postal Service still "wore the shoes" of private enterprise and did not have sovereign status. Consequently, the Postal Service's liability under Title VII should be the same as a private commercial enterprise, including liability for prejudgment interest.

III. Disallowing Interest Against the Postal Service Serves No Legislative or Public Purpose.

Interest has been defined as compensation for the use, detention or forbearance of money. *Shapiro v. Kansas*

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27 *See, e.g., Export-Import Bank of United States,* 12 U.S.C.A. § 635(a)(1) (West 1957 and Supp. 1987); *Federal Deposit Insurance Corporation,* 12 U.S.C.A. § 1819 (West 1980); *Federal Credit Union,* 12 U.S.C.A. § 1757(2) (West, 1980); *Tennessee Valley Authority,* 16 U.S.C.A. § 831c(b) (West 1985); *Federal Home Loan Bank,* 12 U.S.C.A. § 1432(a) (West Supp. 1987); *Pennsylvania Avenue Development Corporation,* 40 U.S.C.A. § 875 (West 1986); *Pension Benefit Guarantee Corporation,* 29 U.S.C.A. § 1302(b)(1) (West 1985); *Small Business Administration,* 15 U.S.C.A. § 634(b)(1) (West 1976); *Commodity Credit Corporation,* 15 U.S.C.A. § 7146(c) (West Supp. 1987); *Federal Crop Insurance Corporation,* 7 U.S.C.A. § 1506(d) (West Supp. 1987).

Public Employees Retirement System, 216 Kan. 353, 532 P.2d 1081 (1975). As the court therein stated:

> In our society today money is a commodity with a legitimate price on the market and loss of its use, whether occasioned by the delay or default of an ordinary corporation, citizen, state or municipality should be compensable.

Id. at 1084. Judge Posner said, "[a] loan without interest is like a gift[.]" R. Posner, The Economics of Justice, 159 (1981).

The Supreme Court has characterized prejudgment interest as "an element of complete compensation." *West Virginia v. United States,* 107 S. Ct. 702, 706 (1987). It is a normal incident of recovery under breach of contract and employment discrimination actions where the amount owed (backpay) is liquidated and determinable at any given time.[28] As noted by Judge Ginsberg in her dissent in *Shaw v. Library of Congress,* 747 F.2d 1469 (D.C. Cir. 1984), *rev'd,* 106 S. Ct. 2957 (1986): "prejudgment interest . . . generally ranks as an element of damages, not as a component of 'costs'." *Id.* at 1488 (citing to 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, Sections 2666, 2670 (2d ed. 1983)). Its availability depends upon the substantive law (state or federal) that governs the controversy. *See General Motors Corp. v. Devex Corp.,* 461 U.S. 648 (1983).

The "no interest rule" is an outgrowth of the principle of sovereign immunity and is relevant only in substantive

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[28] *See* D. Dobbs, Remedies, 165-74 (1982). *See also Kennedy Elec. Co. v. United States Postal Serv.,* 508 F.2d 954 (10th Cir. 1974) (prejudgment interest upheld on plaintiff's contract claim).

waiver cases involving the government or its agencies which enjoy sovereign status. The rule is that interest may not be recovered against the "United States" in the absence of an express statutory waiver. The rule's purpose is prevention of direct and costly charges on the public treasury. Therefore, courts have a duty to carefully observe express conditions defined by Congress before allowing such awards. *See Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947). More recently, the Court stated:

> [t]he purpose of the rule is to permit the government to "occupy an apparently favored position," by protecting it from claims for interest that would prevail against private parties.

Library of Congress v. Shaw, 106 S. Ct. 2957, 2962 (1986) (citation omitted). Because substantive waivers are narrowly construed by the courts, no awards of interest will be made against the United States unless the statute giving rise to the claim expressly provides for interest as an incident of suit or as a normal element of damages.

The "no interest rule" is inapplicable, however, in status waiver cases where the defendant, as a "sue and be sued" agency, does not enjoy "sovereign status". Whatever causes of action, elements of damages, incidents of suit or process are available to a litigant against a private commercial enterprise would also be available against a "sue and be sued" agency which Congress intended to function as a private commercial enterprise, unless the charter of the agency expressly limited the broad waiver of immunity. Usually, judgments against "sue and be sued" agencies reach the agency's own funds and not the general treasury of the United States.

If the Court permitted prejudgment interest awards against the Postal Service, it would not be subjecting the U. S. Treasury to direct or even indirect charges, for the Postal Service has control of its own revolving fund, separate and apart from the general revenues of the United States Treasury. In addition, Congress expressly stated in Section 409(e) that "[a] judgment against the government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service." 39 U.S.C. § 409(e) (1982). Clearly then, the public treasury will not be put at risk if this Court permits an award of interest against the Postal Service. Congress intended that the Postal Service pay its own liabilities out of its own funds. If the purpose of the "no interest rule" is to protect the United States treasury, then it is senseless to apply the rule to the free enterprise-like Postal Service, because the general funds in the United States Treasury are already shielded by Section 409(e).

Furthermore, neither of the three exceptions to the liberal construction rule applies to the awarding of prejudgment interest. As has already been shown, by permitting awards of prejudgment interest against the Postal Service, the Court will be furthering Congress' intent to shake up the post office department with the efficiencies of private enterprise. Monetary interest awards against the Postal Service will not prevent or delay the delivery of the mail. A quick perusal of the Yellow Pages will confirm that delivery of the mail is no longer purely a governmental function. The Postal Service hotly competes with other carriers for over-night mail delivery, package delivery, and local courier services.

Acknowledging that the public service *raison d'etre* imposes certain limitations on business operations of the Postal Service, the court in *Milner v. Bolger* examined the question of whether or not an award of prejudgment interest would impede its public-service function and concluded that it would not. "The award of interest on judgments will in no way impair the ability of the Postal Service to 'bind the Nation together . . . '" *Milner v. Bolger,* 546 F.Supp. 375, 380 (E.D. Cal. 1982).

The Supreme Court in *Franchise Tax Board,* unanimously decided just two years before *Shaw* and not referred to at all by the Court in *Shaw,* specifically stated that "we must presume that the [Postal] Service's liability is the same as that of any other business." 104 S. Ct. at 2554. Clearly then this Court has already recognized that the Postal Service is a private commercial enterprise for purposes of sovereign immunity. Certainly, one cannot conclude that Congress intended to narrowly construe the "sue and be sued" clause on the basis of the legislative history of the Postal Reorganization Act. It is equally illogical to use the substantive waiver provisions of Title VII applicable to the United States government as a limitation on the status waiver effected by the Postal Reorganization Act. It strains reason to argue, as the Postal Service has, that Title VII is an indication of Congress' intent to narrowly construe the "sue and be sued" clause in the Postal Service charter. As the court in *Nagy v. United States Postal Service,* 777 F.2d 1190 (11th Cir. 1985), stated:

> The Postal Service argues that in including it in the 1972 amendments to Title VII, Congress demonstrated an intent to construe the "sue and be sued"

> clause narrowly, in effect, to repeal partially the general waiver created by Section 401(1). The difficulty with this argument is that the Postal Service has not shown this to be the *plain* purpose of Congress. The unequivocal teaching of *Burr* is that a limitation on a general waiver of sovereign immunity will not be readily inferred. We find no plain purpose in the 1972 amendments to Title VII to limit the general waiver of sovereign immunity in Section 401(1).

Id. at 1193. Consequently, this case is neither the time nor place to create non-competitive, non-market protections for the Postal Service.

In short, none of the three exceptions to the liberal construction rule applies to this case. Indeed, an award of prejudgment interest against the Postal Service furthers Congress' intent that the Service operate as a private enterprise. Vulnerability to prejudgment interest encourages a higher level of managerial decision-making. The public interest is best served by increased managerial efficiency within the Postal Service. Consequently, an award of prejudgment interest simply furthers the purposes of the Reorganization Act and imposes no burden at all upon the public treasury.

CONCLUSION

The reasoning of the court *en banc* below is erroneous in that it does not defer to the well-settled rule that status waivers of immunity must be liberally construed. Federal courts have consistently interpreted the scope of "sue and be sued" clauses to allow awards of interest.

This is particularly true for agencies such as the Postal Service which Congress clearly intended to function as a private commercial enterprise.

Allowing awards of interest against the Postal Service will encourage early settlement of meritorious claims and more cost-effective managerial decision-making. Cost-effective management was a primary goal of Congress in enacting the Postal Reorganization Act. Furthermore, awards of interest would not deplete the public treasury because the Postal Service, under the Reorganization Act, must pay its own liabilities. Therefore, the purpose of the "no-interest rule," which is to protect the public fisc, would not be served by a denial of interest in this case. To the contrary, Congress' intentions would best be served by allowing the recovery of interest to Theodore Loeffler, an employee of the Postal Service, who prevailed on his Title VII claim.

Accordingly, for all the above reasons, Petitioner prays this Honorable Court to reverse the decision of the Court of Appeals and to remand this case to the trial court for an award of prejudgment interest in an amount to be determined by the trial court, in its discretion.[29]

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[29] For guidance as to the amount of interest to be awarded, the trial court might be instructed to employ the methodology suggested by the court in *Richardson v. Restaurant Marketing Ass'n.*, 527 F. Supp. 690 (N.D. Cal. 1981). In that Title VII case, the court stated that "interest on any award in this case shall be calculated from the end of each calendar quarter, on the amount then due and owing, at 90% of the average prime rate for the year in which the calendar quarter occurs." *Id.* at 698.

Dated August 20, 1987

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 86-1431

(5)

In the Supreme Court of the United States

OCTOBER TERM, 1987

THEODORE J. LOEFFLER, PETITIONER

v.

PRESTON R. TISCH, POSTMASTER GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether prejudgment interest may be awarded against the United States Postal Service in a suit brought pursuant to Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A11) is reported at 806 F.2d 817. The panel opinion of the court of appeals (Pet. App. A12-A20) is reported at 780 F.2d 1365. The opinions and orders of the district court (Pet. App. A21-A34) are unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 8, 1986. The petition for a writ of certiorari was filed on March 5, 1987, and was granted on June 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The texts of 39 U.S.C. 401(1) and 42 U.S.C. 2000e-16 are set out in an appendix to this brief.

STATEMENT

1. Petitioner was employed by the United States Postal Service (Postal Service or USPS) as a rural letter carrier. In 1980 he was discharged from his position for repeatedly refusing to follow prescribed procedures in preparing his mail for delivery. After unsuccessfully seeking administrative relief, petitioner brought this suit against the Postmaster General pursuant to Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, arguing that he had been discharged as a result of sex discrimination. After a bench trial, the United States District Court for the Eastern District of Missouri ruled for petitioner; the court found that the Postal Service had not discharged two female rural letter carriers although they had engaged in the same misconduct as petitioner. Pet. App. A26-A30. The district court accordingly ordered petitioner reinstated with backpay (*id.* at A26-A34). But the court held that the United States' sovereign immunity foreclosed the addition of prejudgment interest to the backpay award (*id.* at A21).

On appeal, a panel of the Eighth Circuit, relying on that court's prior opinion in *Cross* v. *USPS*, 733 F.2d 1327, aff'd en banc by an equally divided court, 733 F.2d 1332 (1984), cert. denied, 470 U.S. 1051 (1985), affirmed the denial of prejudgment interest against USPS, holding that an award of interest was barred by sovereign immunity (Pet. App. A19-A20). The panel's ruling was in turn affirmed by a six-to-five vote of the en banc Eighth Circuit (*id.* at A1-A11).

The majority adopted the reasoning of the *Cross* panel, adding that its "conclusion is strongly reinforced by the recent decision of the Supreme Court in *Library of Congress* v. *Shaw*, [No. 85-54 (July 1, 1986)], holding that Congress, in enacting Title VII, did not waive the Government's immunity from interest" (Pet. App. A2). In reaching this

conclusion, the court of appeals found it irrelevant that Congress has permitted USPS to "sue and be sued in its official name" (39 U.S.C. 401(1)). The court noted that, while the "sue and be sued" clause was enacted in 1970 as part of the Postal Reorganization Act, 39 U.S.C. (& Supp. III) 101 *et seq.*, Congress did not authorize Title VII actions against the Postal Service until 1972. The court therefore explained that petitioner's action "was not brought under the sue-and-be-sued clause of the Postal Reorganization Act. Instead it was brought under Title VII as amended in 1972" (Pet. App. A4). In these circumstances, the court concluded that "the scope of [petitioner's] remedy must be determined by reference to the federal sector provisions of Title VII, and not b[y] reference to the sue-and-be-sued clause of the Postal Reorganization Act" (*id.* at A5).

The court found support for its conclusion in the uniform judicial recognition that the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, and not the Postal Reorganization Act's "sue and be sued" clause, provides the waiver of immunity for tort actions against the Postal Service (Pet. App. A6). And the court observed both that "Congress explicitly treated the Postal Service as a federal agency when it amended Title VII in 1972 to make the Postal Service and other federal agencies amenable to suit under Title VII," and that "the Postal Service's legal relationship with its employees is predominantly that of a federal agency, not that of an ordinary business" (*id.* at A7). The court therefore found it "apparent that Congress did not intend to place postal employees in a better position than all other federal employees with respect to interest in Title VII cases" (*id.* at A8).

Judge Arnold, joined by four other judges, dissented (Pet. App. A8-A11). He noted that the en banc court's holding "creates a square conflict" with *Nagy* v. *USPS*, 773 F.2d 1190 (11th Cir. 1985), and he found support for petitioner's position in *Franchise Tax Board* v. *USPS*, 467

U.S. 512 (1984) (Pet. App. A9). And while he observed that "there are respects, and important ones, in which the Postal Service is unlike a private employer," Judge Arnold doubted "that sovereign immunity with regard to an ordinary incident of relief in a civil action is one of those differences" (*id.* at A10). He therefore would have held "the Postal Service to be like a private commercial enterprise for purposes of sovereign immunity" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

It is common ground that an award of interest against the federal government is permissible only if the United States has waived the sovereign immunity that would otherwise bar such an award. See *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 4. And it is equally clear—as both petitioner (Pet. Br. 17) and the dissenters below (Pet. App. A9) acknowledge—that Congress generally has not made interest available to federal employees who obtain backpay from the government under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. That conclusion necessarily follows from this Court's holding in *Shaw* that sovereign immunity bars the payment of interest on attorneys' fees awarded against the government under Title VII (see slip op. 12).[1] The question in this case therefore is whether Congress has created

[1] Prior to *Shaw*, the courts of appeals had uniformly held that interest is not available on Title VII backpay awards against the government. See *Segar* v. *Smith*, 738 F.2d 1249, 1296 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985); *Saunders* v. *Claytor*, 629 F.2d 596, 598 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *Blake* v. *Califano*, 626 F.2d 891, 894 (D.C. Cir. 1980); *deWeever* v. *United States*, 618 F.2d 685, 686 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F.2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977).

a special rule that waives the government's immunity against Title VII interest awards for Postal Service employees, but not for other federal workers.

In asserting that Congress has created such a rule—and in thus seeking to escape from what otherwise would be the concededly dispositive holding of *Shaw*—petitioner focuses exclusively on 39 U.S.C. 401(1). That provision, enacted in 1970 as part of the Postal Reorganization Act that created the Postal Service, 39 U.S.C. (& Supp. III) 101 *et seq.*, provides that USPS has the power "to sue and be sued in its official name." Citing *Franchise Tax Board* v. *USPS*, 467 U.S. 512 (1984), and a number of this Court's earlier decisions, petitioner contends that such "sue and be sued" clauses generally are viewed as broad waivers of sovereign immunity that should be broadly construed to permit awards of interest. But whatever the validity of this mode of interpretation in other contexts, it has no application here.

In creating the Section 717 discrimination remedy in 1972, Congress recognized a distinct class of federal Title VII defendants that are dealt with differently from those in the private sector. This new federal sector remedy "create[d] an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown* v. *GSA*, 425 U.S. 820, 829 (1976). By compelling federal sector defendants to play an active administrative role in this new federal sector process, Congress in Section 717 created a structure that differs dramatically from that used to process complaints of employment discrimination in the private sector.

This background makes it clear that the terms of Section 717—which concededly does not provide for interest—are controlling in this case. When Congress lifted the govern-

ment's immunity from suit under Title VII in 1972, it set out in precise terms the nature of the action as to which sovereign immunity was being waived. It is therefore the scope of the Section 717 waiver that is controlling here. As the court of appeals explained, the fact that Congress previously had made the Postal Service amenable to other types of lawsuits under Section 401(1) is a fortuity that has no application in this case. Indeed, Sections 717 and 401(1) in terms authorize suits against different entities. Section 717(c) waives the government's immunity in Title VII suits against "the head of the [plaintiff's] department, agency, or unit"; Section 401(1), in contrast, makes the Postal Service amenable to suit "in its official name."

In any event, even if Section 401(1) somehow is deemed the provision that provides the waiver of immunity in this case, Postal Service employees are accorded their *cause of action* by Section 717. Section 401(1) (assuming that it is relevant here at all) simply makes the Postal Service amenable to process. The scope of the available recovery is spelled out by Section 717—a statute that does not provide for awards of interest. And there is nothing anomalous in treating Postal Service employees the same as other federal sector workers for purposes of Section 717, as petitioner contends. Congress explicitly viewed Postal Service employees as federal workers for a wide range of purposes. In particular, Congress consistently has treated Postal Service workers like their counterparts at other federal agencies for purposes of equal employment opportunity. Against this background, it is hardly likely that Congress intended to place Postal Service employees in a better position than all other federal employees with respect to prejudgment interest in Title VII cases.

ARGUMENT

SOVEREIGN IMMUNITY BARS AN AWARD OF PREJUDGMENT INTEREST AGAINST THE POSTAL SERVICE IN A SUIT UNDER SECTION 717 OF TITLE VII

A. Section 717 Sets Forth A Comprehensive Set of Remedial Procedures That Differ From Those Governing Private Sector Title VII Actions

When Congress enacted Title VII in 1964, the statute's definition of "employers" who are subject to suit excluded (as it still does) both the United States and any "corporation wholly owned by the Government of the United States." 42 U.S.C. 2000e(b). In 1972, Congress amended Title VII by adding a Section 717 that makes federal employers subject to suit for employment discrimination. Pub. L. No. 92-261, § 11, 86 Stat. 111, codified at 42 U.S.C. 2000e-16. This enactment accomplished two things. It provided a cause of action for federal employees who are subjected to discriminatory personnel actions. And at the same time, by making the United States amenable to a civil action (see 42 U.S.C. 2000e-16(c)) and liable for backpay and related remedies (see 42 U.S.C. 2000e-16(d)), "Congress effected a waiver of the Government's immunity from suit." *Shaw*, slip op. 12. This enactment amounted to what petitioner has labeled a "substantive waiver" of sovereign immunity (Pet. Br. 5)—a precisely-defined waiver that is applicable on a government-wide basis. And that waiver was effected not by adding the federal government to the list of employers already subject to Title VII, but by enacting a new Section 717 (42 U.S.C. 2000e-16), titled "Employment by Federal Government," that "create[d] an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown* v. *GSA*, 425 U.S. 820, 829 (1976).

The new remedy created by Section 717 compels the federal sector defendant to play an active administrative role in dealing with discrimination complaints in a way that the private sector defendant need not, and thus mandates a procedural course for federal employees that differs from the one made available to their private sector counterparts. In conjunction with the Equal Employment Opportunity Commission (EEOC or Commission), federal agencies are obligated to develop and implement plans to achieve equal employment opportunity. EEOC regulations require federal agencies to create an elaborate administrative mechanism for the processing of discrimination complaints, which includes procedures for investigations and hearings at agency expense. 29 C.F.R. 1613.211-1613.222. A federal worker who believes that he has been the victim of discrimination must first bring his complaint to the employing agency (42 U.S.C. 2000e-16(b)), an obligation that the Court has characterized as a "rigorous administrative exhaustion requirement[]" (*Brown*, 425 U.S. at 833). The employee is entitled to a hearing before an administrative law judge selected by the EEOC (29 C.F.R. 1613.218); the examiner's decision is binding on the agency unless rejected within 30 days (29 C.F.R. 1613.220(d)).

If he receives an adverse decision there, the employee may either appeal to the EEOC or bring an action in district court against "the head of the department, agency, or unit at which he is employed." 42 U.S.C. 2000e-16(c). If the employee chooses to appeal to the EEOC, the Commission's decision is binding upon the agency, generally without recourse to judicial review, although the employee may seek de novo review of an adverse decision. 29 C.F.R. 1613.281; see *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). The employee also may file a civil action if, after having chosen to pursue an administrative appeal, the

EEOC rejects his claim or takes no action on it within 180 days. 42 U.S.C. 2000e-16(c). See generally *Brown*, 425 U.S. at 832.

In contrast, an employee in the private sector brings his complaint of discrimination not to his employer but directly to the EEOC, which (if it finds the complaint meritorious) attempts to obtain relief on the employee's behalf by means of conference and persuasion (see 42 U.S.C. 2000e-5(a)). If the EEOC is unable to obtain adequate relief by informal means, it does not (as in the federal sector) take action that is binding on the employer; instead, it may bring suit on the employee's behalf (42 U.S.C. 2000e-5(f)). If the Commission rejects a complaint, the employee may bring a civil action of his own (*ibid.*).[2]

The differences between Section 717 and the private sector Title VII remedy extend beyond procedure. Because it "provides for a careful blend of administrative and judicial enforcement powers," Section 717 is the exclusive antidiscrimination remedy for federal employees (*Brown*, 425 U.S. at 833); Title VII has no such preemptive effect for employees in the private sector. And Section 717 does not, of course, provide for interest as part of the backpay remedy, as Title VII does in private sector actions. See *Shaw*, slip op. 12.

B. Congress Has Included The Postal Service In The Federal Sector For Purposes of Title VII Litigation

There is no dispute that petitioner's cause of action has properly—and necessarily—proceeded under Section 717,

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[2] These differences between public and private sector procedures were even more dramatic at the time of the enactment of Section 717. Then, entirely different agencies were given responsibility for redressing discrimination in the public and private sectors; while the EEOC acted in the private sector, the Civil Service Commission oversaw implementation of Title VII in federal employment. It was not until 1978 that the EEOC assumed the antidiscrimination functions of the Civil Service Commission. See 42 U.S.C. 2000e-4 note.

rather than under the provisions of Title VII governing private sector defendants (see Pet. Br. 2). Liability under Title VII was expresly extended to the Postal Service by Section 717, the federal sector provision. 42 U.S.C. § 2000e-16(a). Indeed, when Congress created the Postal Service in 1970, it specifically considered and rejected the suggestion that USPS be covered by the then-existing provisions of Title VII relating to the private sector. On the Senate floor, Senator Cook proposed an amendment to the Postal Reorganization Act that would have extended Title VII to the Postal Service; the amendment passed the Senate by a 93-0 vote. See 116 Cong. Rec. 22279-22280 (1970). But the Cook amendment was deleted in conference because of "adamant" opposition from the House (see *id.* at 26955 (remarks of Sen. Cook)).

The conferees acted after receiving assurances from the Civil Service Commission that, "[s]ince the new Postal Service would be in the Executive Branch of the Government and Executive Order 11478 [guaranteeing nondiscrimination in the federal service] applies to the Executive Branch, employees of the new Postal Service would continue to have coverage under the Executive Order" (*id.* at 26955 (remarks of Sen. Cook) (emphasis omitted)). Both Houses of Congress therefore acted with the expectation that Postal Service employees would be covered by the same statutory and administrative antidiscrimination provisions that applied to other federal workers, provisions that the conferees understood to "afford[] much more protection to the person who is complaining" than did Title VII (*id.* at 27597 (remarks of Rep. Daniels)). See *id.* at 26953, 26956, 26957 (remarks of Sen. McGee); *id.* at 27607 (remarks of Rep. Udall).[3]

[3] It was explained on the floor that 5 U.S.C. 7151 (since recodified at 5 U.S.C. 7201, see Pub. L. No. 95-454, § 703(a)(1), 92 Stat. 1216), which sets out the basic antidiscrimination policy for federal employees, would apply to the Postal Service. See 116 Cong. Rec. 27607 (1970) (remarks of Rep. Udall). At the same time, Congressmen evidently recognized that Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 comp.), would have to be amended to cover the new Postal Service. See *ibid.* (remarks of Rep. Udall); *id.* at 26955 (remarks of Rep. Cook). Senator McGee, floor manager for the bill that became the Postal Reorganization Act, explained that if antidiscrimination remedies provided by Executive Order 11478 proved inadequate, "this body would proceed at once * * * to legislate appropriately without delay" (116 Cong. Rec. 26957 (1970) (remarks of Sen. McGee)).

C. Section 717 of Title VII, Not Section 401(1) of the Postal Reorganization Act, is the Source of the Waiver of Sovereign Immunity in This Case

In 1970, when Congress included the Section 401(1) "sue and be sued" clause in the Postal Reorganization Act, it thus specifically chose not to make the Postal Service liable under Title VII. When Congress lifted the government's immunity from suit under Title VII two years later, it did so on a government-wide basis, in a broad but precisely-defined way. It is that second waiver that makes this suit possible, and that sets out in precise terms the nature of the action as to which sovereign immunity was being waived. It is therefore the scope of the Section 717 waiver, which concededly does not extend to awards of interest, that is controlling here. Cf. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). As the court of appeals explained (Pet. App. A3-A4), the fact that Congress previously had made the Postal Service amenable to other types of lawsuits by enacting Section 401(1) is a fortuity that has no application in this case. Cf. *Shaw*, slip op. 9.

Petitioner, of course, offers a different view of the statutory structure. Under his analysis of the case (Pet. Br. 18-19, 30-31), Section 717 creates the cause of action for federal employment discrimination and Section 401(1) provides the waiver of sovereign immunity that permits

the Title VII cause of action to be asserted against the Postal Service, just as, for example, a state garnishment statute might create a cause of action against all employers that is made applicable to the Postal Service by Section 401(1). See *Franchise Tax Board*, 467 U.S. at 519. But in the circumstances of this case, petitioner's attempt to separate the cause of action from the waiver of immunity ignores the way in which Congress chose to make the United States liable for employment discrimination.

When Congress excepted the federal government from the Title VII definition of "employer" in 1964, it explicitly preserved the sovereign immunity of federal employers in Title VII suits. The creation of a Title VII cause of action against the government in 1972, which for the first time made federal entities (including the Postal Service) amenable to process and liable for damages in employment discrimination cases, was expressly intended to waive that immunity. See S. Rep. 92-415, 91st Cong., 1st Sess. 16 (1971). See generally H.R. Rep. 92-238, 92d Cong., 2d Sess. 25 (1971); 118 Cong. Rec. 4922 (1972) (remarks of Sen. Williams); *id.* at 4929 (remarks of Sen. Cranston); *Brown*, 425 U.S. at 827-828. It is thus the terms of this 1972 waiver—a waiver effected by creation of a cause of action, the scope of which is coterminous with that cause of action—that establish the "limitations and conditions upon which the Government [has] consent[ed] to be sued." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).[4]

Indeed, Sections 717 and 401(1) in terms authorize suits against different entities. Section 717(c) waives the government's immunity in Title VII suits agains "the head of the

[4] Petitioner's misunderstanding evidently stems from his belief that, "had Congress not expressly in the Postal Reorganization Act exempted the Postal Service from Title VII, then under the liberal construction rule [relating to the interpretation of "sue and be sued" clauses], the Postal Service would have been liable under Title VII back in 1970" (Pet. Br. 31). In fact, however, the Postal Reorganization Act did not expressly exempt USPS from, or indeed make any reference to, Title VII. It is Title VII itself that preserved the sovereign immunity of all federal entities in employment discrimination suits by excepting the United States from the definition of "employer." Similarly, petitioner asserts that the court of appeals read Section 717 to "reinstate sovereign immunity to the Postal Service with respect to prejudgment interest" (Pet. Br. 19). But sovereign immunity could not have been reinstated in 1972 because it had not yet been waived in Title VII actions. As the court of appeals explained, "[u]ntil Congress some two years after passing the Postal Reorganization Act amended Title VII to extend it to the federal sector with additional provisions applicable only to that sector, there had been no congressional waiver, presumptive or otherwise, of the Postal Service's immunity to Title VII actions" (Pet. App. A5). Petitioner thus fails to recognize that Section 717 was an initial, and limited, waiver of immunity.

[plaintiff's] department, agency, or unit," and petitioner's action in fact proceeded against the Postmaster General. Section 401(1), in contrast, makes the Postal Service amenable to suit "in its official name." This difference has real significance. Failure to name the agency head (rather than the agency) as defendant in a Title VII action may lead to dismissal of the case. See, *e.g.*, *McGuinness* v. *USPS*, 744 F.2d 1318, 1322-1323 (7th Cir. 1984) (alternative holding); *Cooper* v. *USPS*, 34 Fair Empl. Prac. Cas. (BNA) 985 (S.D. Cal. 1983), aff'd, 740 F.2d 714, 716 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); *Newbold* v. *USPS*, 614 F.2d 46, 47 (5th Cir.), cert. denied, 449 U.S. 878 (1980); *Davis* v. *Califano*, 613 F.2d 957, 958 n.1 (D.C. Cir. 1979); *Morgan* v. *USPS*, 798 F.2d 1162, 1165 n.3 (8th Cir. 1986) (Rehabilitation Act), cert. denied, No. 86-5979 (Mar. 30, 1987); *Ellis* v. *USPS*, 784 F.2d 835, 838 (7th Cir. 1986) (Age Discrimination in Employment Act). Con-

versely, courts have explained that suits proceeding under Section 401(1) must be directed at the Postal Service itself (and not at the Postmaster General or other Postal Service officials), although they have declined to dismiss improperly captioned actions in the absence of an objection from the Postal Service. See *National Ass'n of Postal Supervisors* v. *USPS*, 602 F.2d 420, 422-423 n.1 (D.C. Cir. 1979); *Ass'n of American Publishers, Inc.* v. *Governors of the USPS*, 485 F.2d 678, 771 (D.C. Cir. 1973).[5]

While this distinction between Sections 717 and 401(1) is technical, it plainly shows that the statutes create distinct waivers of sovereign immunity that operate in different types of lawsuits. Section 401(1) makes the Postal Service itself " 'amenable to judicial process' " (*Franchise Tax Board*, 467 U.S. at 518 (citation omitted); see *id.* at 525). But a Title VII action may proceed only against the Postmaster General; in effect, as the court of appeals observed, "the Postal Service is amenable to process in a Title VII case only under the federal sector provisions of Title VII. It follows that the scope of [petitioner's] remedy must be determined by reference to the federal sector provisions of Title VII, and not b[y] reference to the sue-and-be-sued clause of the Postal Reorganization Act." Pet. App. A5.

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[5] In *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 249-250 (1940), the Court concluded that a statute "authoriz[ing] suits by or against the Administrator [of the Federal Housing Administration] 'in his official capacity' " permitted actions against the Administration itself. The Court reasoned that "[t]he Administrator acts for and on behalf of the Federal Housing Administration, since by the express terms of the Act all the powers of the latter 'shall be exercised' by him." That is not true of the Postal Service; a number of powers are specifically vested in the Postal Governors and may not be delegated to the Postmaster General, the Postal Service's chief executive officer. See 39 U.S.C. 202, 203, 402.

This analysis hardly means, as petitioner asserts (Pet. Br. 30), either that the "sue and be sued" clause in Section 401(1) lacks prospective effect or that Congress must specifically apply to the Postal Service every cause of action that it creates in the future. Whenever Congress creates a cause of action that may be asserted against commercial entities generally, that action may (absent indications of contrary congressional intent) be asserted against federal entities that are subject to "sue and be sued" clauses. But that is not the case here. Section 717 created a special remedy, with special procedures and limitations, that applies only to federal defendants; it was passed to waive the blanket immunity from employment discrimination suits that had been carefully preserved at the time of Title VII's original enactment in 1964. It therefore must be understood as a threshold waiver of immunity. See *Shaw*, slip op. 12.

Petitioner's lengthy discussion of the proper, liberal interpretation of "sue and be sued" clauses accordingly is beside the point, because Section 401(1) has no application here. And as *Shaw* established (and petitioners concede), Section 717—the source of the waiver that defines the scope of the government's liability in this case—does not waive the government's sovereign immunity against awards of interest.

D. The Remedy Created By Section 717 Does Not Provide For Awards Of Interest

1. The background and structure of Title VII and the Postal Reorganization Act also compel a related but distinct conclusion: even if Section 401(1) somehow is deemed the provision that provides the waiver of immunity in this case, Postal Service employees are accorded their *cause of action* by Section 717. Section 401(1) (assuming that it is relevant here at all) simply makes the Postal Service amenable to process. The scope of the available recovery is spelled out by the statute providing the cause of

action. And here, that statute—Section 717—does not provide for awards of interest.

In thus crafting a defined set of procedures and remedies that were made the exclusive avenue of relief from employment discrimination by the Postal Service and other federal sector defendants, Congress delimited the general authority to sue and be sued by the terms of the remedy that it created.[6] Had Congress in terms stated that prejudgment interest is unavailable in actions under Section 717, there could be no question about the outcome of this case. The fact that the "no-interest" rule is not made explicit in the statute, but rather is a conclusion drawn by this Court in *Shaw* from the absence of language clearly addressing the issue, does not make the rule any less binding.

2. a. Petitioner nevertheless disputes this seemingly self-evident proposition. Pointing to Section 401(1) and listing the attributes that the Postal Service shares with private corporations (Pet. Br. 21-24), petitioner argues that Congress intended USPS to "operate as a private commercial enterprise" (Pet. Br.) and therefore maintains that it would be inconsistent with the goals of the Postal Reorganization Act to treat Postal Service employees like

[6] This is hardly a novel conclusion. Courts have used the same reasoning in resolving tort claims against the Postal Service. Congress specifically provided in the Postal Reorganization Act that the Federal Tort Claims Act (FTCA) "shall apply to tort claims arising out of activities of the Postal Service" (39 U.S.C. 409(c)). See also 28 U.S.C. 2679(a). Notwithstanding Section 401(1), then, the courts have uniformly held that persons suing the Postal Service in tort must proceed under, and are subject to the limitations of, the FTCA. See *Insurance Co. of North America* v. *USPS*, 675 F.2d 756, 758 (5th Cir. 1982); *Contemporary Mission* v. *USPS*, 648 F.2d 97, 104-105 n.9 (2d Cir. 1981); *Sportique Fashions, Inc.* v. *Sullivan*, 597 F.2d 664, 665-666 n.2 (9th Cir. 1979). Section 717, as a comprehensive and exclusive remedy for use against federal defendants, operates in the same way to define the scope of the relief available against the Postal Service in employment discrimination cases.

their federal sector counterparts for purposes of Title VII. But even if petitioner's argument could be reconciled with this Court's interpretation of Section 717 in *Shaw*, his bald assertion about the mission and organization of the Postal Service disregards the careful choices Congress made in providing that, in many ways, the Postal Service should continue to operate as a traditional federal agency. In particular, petitioner's analysis ignores the clear indications that, in creating a dichotomy between public and private sector Title VII interest awards, Congress would have expected awards against the Postal Service to fall on the public side of the line.

To be sure, the words "sue and be sued," as applied to the Postal Service in Section 401(1), " 'in their normal connotation embrace all legal process incident to the commencement and continuation of legal proceedings' " (*Franchise Tax Board*, 467 U.S. at 517 (citation omitted)). The liability of the Postal Service is thus presumptively equivalent to that of a private entity when it operates in a commercial capacity (see *id.* at 518).[7] At the same time, however, "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive im-

[7] As petitioner recognizes (Pet. Br. 16-17), the Court has taken this approach—looking to the general policy behind the congressional scheme—only in cases involving federal instrumentalities that are covered by a "sue and be sued" clause and that have been " 'launched • • • into the commercial world' " (*Franchise Tax Board*, 467 U.S. at 518, (quoting *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940)). See *Reconstruction Finance Corp.* v. *J.G. Menihan Corp.*, 312 U.S. 81, 84 (1941). In other cases involving waivers of immunity, the Court consistently has emphasized that it will "construe waivers strictly in favor of the sovereign, see *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not enlarge the waiver " 'beyond what the language requires,' " *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), quoting *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)" (*Shaw*, slip op. 7). Compare *id.* at 1-2 (Brennan, J., dissenting).

munity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy" (*id.* at 521). A "sue and be sued" clause therefore does not effect a complete waiver when that result would be inconsistent " 'with the statutory or constitutional scheme' " (*id.* at 517-518 (citation omitted)).[8] And here—where Congress explicitly refrained from treating the Postal Service as a private corporation for purposes of Title VII liability, instead creating a discrete Title VII remedy for all federal employees—Congress plainly did not subject the Postal Service to suit on the same terms as are applicable to a private entity.[9]

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[8] Courts therefore have concluded that "sue and be sued" clauses do not function as complete waivers of sovereign immunity in a variety of settings, as petitioner himself recognizes (Pet. Br. 13-14 & n.7). See, *e.g.*, *A.L.T. Corp.* v. *SBA*, 823 F.2d 126, 128 (5th Cir. 1987); *Hill* v. *National Flood Ins. Program* (*In re Estate of Lee*), 812 F.2d 253, 256 (5th Cir. 1987); *R & R Farm Enterprises* v. *Federal Crop Insurance Corp.*, 788 F.2d 1148, 1152-1153 (5th Cir. 1986); *Merced Production Credit Ass'n* v. *Sparkman* (*In re Sparkman*), 703 F.2d 1097, 1101 (9th Cir. 1983); *Painter* v. *TVA*, 476 F.2d 943, 944 (5th Cir. 1973). Cf. *Florida Dep't of Health & Rehabilitative Services* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 149-150 (1981) ("sue and be sued" clause does not waive state's Eleventh Amendment immunity).

[9] For this reason, petitioner's lengthy argument that the liability of the Postal Service must be precisely equivalent to that of a private corporation (Pet. Br. 21-30)—and his related reliance on decisions interpreting "sue and be sued" clauses as they bear on the commercial activities of federal entities (Pet. Br. 7-15)—is without merit. The decisions cited by petitioner are premised on the proposition that the federal entity had been " 'launched • • • into the commercial world' " (*Franchise Tax Board*, 467 U.S. at 520 (citation omitted)). See *Shaw*, slip op. 7 n.5 (federal entity "cast off the cloak of sovereignty and assumed the status of a private commercial enterprise"); *Standard Oil Co.* v. *United States*, 267 U.S. 76, 79 (1925). Compare *United States* v. *Worley*, 281 U.S. 339, 343-344 (1930). But none of those cases involved a situation, such as the one here, where Congress sharply differentiated between federal and private sector defendants and explicitly placed the entity subject to the "sue and be sued" clause on the

b. In fact, Congress plainly viewed postal workers as federal employees.[10] It is true, as petitioner notes (Pet. Br. 23), that Postal Service labor relations (which are

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federal side of the line. That Congress took such a step here plainly shows that it viewed the relationship between the Postal Service and its e oyees to have a governmental, rather than a private and commercial, nature.

[10] Outside the employment context as well, Congress has given the Postal Service—which is, after all, an "independent establishment of the executive branch of the Government of the United States" (39 U.S.C. 201)—a wide range of powers and attributes that are not shared by any private entity. The Postal Service exercises the power of eminent domain "in the name of the United States" (39 U.S.C. 401(9)), promulgates regulations and publishes them in the Code of Federal Regulations (39 U.S.C. 401(2)), investigates criminal offenses and enforces certain federal laws (39 U.S.C. 404(7), 410(b)(2), 603, 3003), levies fines (39 U.S.C. 5206, 5403, 5604), enters into international agreements (39 U.S.C. 407, 408), has special cooperative arrangements with other federal agencies (39 U.S.C. 411), and receives some measure of protection from private competition in its operations (39 U.S.C. 601).

Further, while the Postal Service is generally excepted from laws governing other federal agencies (39 U.S.C. 410(a)), it is specifically treated—both in the Postal Reorganization Act and in subsequently-enacted statutes—as a federal agency for purposes of tort claims (39 U.S.C. 409(c)), service of process and rules of procedure (39 U.S.C. 409(b)), the Freedom of Information Act, 5 U.S.C. 552 (39 U.S.C. 410(b)(1)), the National Environmental Policy Act of 1969 (see *Chelsea Neighborhood Ass'ns* v. *USPS*, 516 F.2d 378 (2d Cir. 1975)), the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801(a)(1)(D)), the Contract Disputes Act of 1978, 41 U.S.C. (& Supp. III) 601 *et seq.* (41 U.S.C. 601(2)), the Government in the Sunshine Act, 5 U.S.C. 552b (39 U.S.C. 410(b)(1)), and a variety of provisions relating to government contracts and operations (39 U.S.C. 410(b)(4) and (5)), including, among others, the Miller Act, 40 U.S.C. (& Supp. III) 270a *et seq.* (39 U.S.C. 410(b)(4)(B)); the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* (39 U.S.C. 410(b)(4)(C)), the Contract Work Hours Standards Act, 40 U.S.C. (& Supp. III) 327 *et seq.* (39 U.S.C. 410(b)(4)(E)), the Government Losses in Shipment Act, 40 U.S.C. 721 *et seq.* (39 U.S.C. 410(b)(4)(F)); the Walsh-Healey Act, 41 U.S.C. (& Supp. III) 35 *et seq.* (39 U.S.C. 410(b)(5)(A)); and the

regulated by Chapter 12 of Title 39, 39 U.S.C. 1201 *et seq.*) are generally modeled on those in the private sector.[11] But the public law rights and obligations of Postal Service employees (set out in Chapter 10 of Title 39, 39 U.S.C. 1001 *et seq.*, and elsewhere in the U.S. Code) are generally identical to those of other federal workers. Postal Service employees, as members of the postal career service, thus are "a part of the civil service" (39 U.S.C. 1001(b)), participate in the Civil Service Retirement System, 5 U.S.C. 8301 *et seq.* (39 U.S.C. 1005(d)), are covered by the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* (39 U.S.C. 1005(c)), and are eligible to transfer to any other position in the executive branch for which they are qualified (39 U.S.C. 1006). They are entitled to veterans' preferences (39 U.S.C. 1005(a)(2)), and "preference eligible" Postal Service employees must be provided the procedural protections of the Civil Service Reform Act of 1978, 5 U.S.C. 7501 *et seq.*; all other Postal Service employees receive those protections unless

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Service Contract Act of 1965, 41 U.S.C. 351 *et seq.* (39 U.S.C. 410(b)(5)(B)). Like other federal agencies, the Postal Service is obligated to implement the requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (39 U.S.C. 410(b)(6)), and USPS buildings, like other public structures, must be designed to accommodate the handicapped, 42 U.S.C. 4151 *et seq.* (39 U.S.C. 410(b)(8)). Indeed, even some of the Postal Service's attributes discussed by petitioner do not have any private sector analogue. Thus, while the structure of USPS generally mirrors that of a private corporation (see Pet. Br. 21), the Postal Service's governing board is appointed by the President with the advice and consent of the Senate (39 U.S.C. (Supp. III) 202(a)). While postal funds are segregated, they remain a part of the United States Treasury (39 U.S.C. 2003(a)). And the Postal Service's budget is submitted to the Office of Management and Budget and is transmitted to Congress by the President as part of the federal budget (39 U.S.C. 2009).

[11] Chapter 12 thus provides for collective bargaining (see 39 U.S.C. 1206) and applies most of the provisions of the National Labor Relations Act to the Postal Service (see 39 U.S.C. 1209).

collective bargaining agreements provide otherwise (see 39 U.S.C. 1005(a)(1) and (2)).[12] And like other federal employees, Postal Service workers may not strike, 5 U.S.C. 7311, 3333 (39 U.S.C. 410(b)(1)).[13]

In addition, Postal Service employees are subject to the same suitability, security, and conduct regulations as other federal workers, Chapter 73 of Title 5, 5 U.S.C. (& Supp. III) 7301 *et seq.* (39 U.S.C. 410(b)(1)), and are restricted by the same nepotism rules, 5 U.S.C. 3110 (39 U.S.C. 410(b)(1)). They are subject to federal withholding and dual pay provisions, 5 U.S.C. 5520, 5532 (39 U.S.C. 410(b)(1)). They are protected by the public sector provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 688 (39 U.S.C. 410(b)(7)); like other federal

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[12] Similarly, Congress recently gave postal supervisors and other Postal Service managerial employees the right to appeal adverse actions to the Merit Systems Protection Board. H.R. 348, 100th Cong., 1st Sess., 133 Cong. Rec. H6978 (daily ed. Aug. 3, 1987). See also 5 U.S.C. (Supp. III) 5734 (providing reimbursement for travel expenses of Postal Service employees who transfer to other agencies). Interest is not available on backpay awarded by the Merit Systems Protection Board under the provisions of the Civil Service Reform Act of 1978. *Frazier* v. *USPS*, 790 F.2d 873, 874 (Fed. Cir. 1986).

[13] Both petitioner (Pet. Br. 20-22) and amicus NAACP Legal Defense and Educational Fund, Inc. (Br. 28) rely on 39 U.S.C. 101(c) in arguing that Congress intended Postal Service and private sector employees to receive equivalent treatment. That provision provides that the Postal Service should "achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States." In fact, however, the policy of Congress is that *all* "[f]ederal pay rates be comparable with private enterprise pay rates for the same levels of work" (Federal Pay Comparability Act of 1970, 5 U.S.C. 5301(a)(3)), although the President is authorized to depart from that standard if "national emergency or economic conditions affecting the general welfare" make it appropriate to do so. 5 U.S.C. 5305(c)(1). See H.R. Rep. 98-425, 98th Cong., 2d Sess. 5 (1984). The policy expressed in 39 U.S.C. 101(c) therefore plainly does not distinguish Postal Service employees from other federal workers.

employees, they are guaranteed the right to petition Congress, 5 U.S.C. 7211 (39 U.S.C. 410(b)(1)), and are subject to the Debt Collection Act of 1982 (5 U.S.C. 5514 (a)(4)(B)). And Postal Service employees must swear or affirm their support for the Constitution before entering upon their duties (39 U.S.C. 1011). During debate on the Postal Reorganization Act, Congressmen accordingly explained that "employees of the U.S. Postal Service * * * would be Federal employees just like their counterparts in [the Department of] State, [the Department of Defense] or the Veterans' Administration" (116 Cong. Rec. 19849 (1970) (remarks of Rep. Mize)), and repeatedly referred to Postal Service workers as "Federal employees" or "government employees." See, *e.g.*, *id.* at 19847 (remarks of Rep. Henderson); *id.* at 19852 (remarks of Rep. Hanley); *id.* at 22340 (remarks of Sen. Fong); *id.* at 22344 (remarks of Sen. Allen). See generally *id.* at 22334 (remarks of Sen. Ervin) ("it is absurd to say that we are dealing here with a relationship similar to that between a private employer and his employees").[14]

c. Of particular importance here, Congress consistently has treated Postal Service workers like their counterparts at other federal agencies for purposes of equal employment opportunity.[15] As we explain above, at the time of the creation of the Postal Service, Congress expressly chose to exclude Postal Service employees from

[14] But cf. 116 Cong. Rec. 22309 (1970) (remarks of Sens. Javits and Case) (Postal Service employees have similarities to private sector workers for purposes of labor-management relations).

[15] Similar action has been taken in areas other than Title VII: the Postal Service also is treated as a federal employer under the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a) and the Rehabilitation Act of 1973 (29 U.S.C. (Supp. III) 791(b), 792(a)(1)(B)(x)). See also 5 U.S.C. 3102 (providing for assistance for the handicapped), made applicable to the Postal Service by 39 U.S.C. 410(b)(1).

Title VII; Congress instead applied the existing federal sector antidiscrimination provisions to USPS. And when Congress extended Title VII to federal employees in 1972, it treated the Postal Service in a manner identical to the way in which it regulated other federal agencies. Thus, Postal Service employees use the same Title VII administrative procedures as do other federal workers. And the lower federal courts have been unanimous in holding that Section 717 serves as the exclusive remedy for Postal Service employees alleging employment discrimination—as it does for other federal, but not private sector, workers.[16]

Postal Service employees therefore were treated by Congress identically to other federal workers for Title VII purposes. They proceed under a federal sector provision, using federal sector procedures, against a precisely-defined federal sector defendant; they are foreclosed from using remedies that were withheld from other federal employees but are available to workers in the private sector. In this setting, it is hardly likely that Congress intended "to place postal employees in a better position than all other federal employees with respect to prejudgment interest in Title VII cases" (*Cross*, 733 F.2d at 1330). To the contrary, such a conclusion " 'would impute to Congress a desire for incoherence in a body of affiliated enactments and for a drastic legal differentiation where policy justifies none' " (*Franchise Tax Board*, 467 U.S. at 524 (citation omitted)).

[16] *Newbold* v. *USPS*, 614 F.2d 46, 47 (5th Cir.), cert. denied, 449 U.S. 878 (1980); *Jacobs* v. *Bolger*, 587 F. Supp. 374, 375 n.1 (W.D. La. 1984), aff'd, 759 F.2d 20 (5th Cir. 1985); *Quillen* v. *USPS*, 564 F. Supp. 314 (E.D. Mich. 1983); *Cooper* v. *USPS*, 34 Fair Empl. Prac. Cas. (BNA) 985 (S.D. Cal. 1983), aff'd, 740 F.2d 714 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); *King* v. *Bailar*, 444 F. Supp. 1093, 1094 n.2 (S.D.N.Y. 1978); *Tufts* v. *USPS*, 431 F. Supp. 484, 487 (N.D. Ohio 1976). See *Nagy* v. *USPS*, 773 F.2d 1190, 1192 (11th Cir. 1985) ("Section 717 is the exclusive remedy for a Postal Service employee alleging illegal discrimination."); *Jarrell* v. *USPS*, 753 F.2d 1088, 1091 (D.C. Cir. 1985) ("Title VII is the exclusive remedy.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1987

39 U.S.C. 401(1) provides:

> The Postal Service shall have the following general powers:
>
> (1) to sue and be sued in its official name[.]

42 U.S.C. 2000e-16 provides:

> **(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage**
>
> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.
>
> **(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress**
>
> Except as otherwise provided in this subsection, the Equal Employment Opportunity Com-

mission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each

department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) **Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant**

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one

hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

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REPLY

BRIEF

(6)

No. 86-1431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THEODORE J. LOEFFLER,
Petitioner,

vs.

PRESTON R. TISCH, POSTMASTER GENERAL
OF THE UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. Section 717 Of Title VII Is Not A Delimitation Of The Postal Service's General Authority To "Sue And Be Sued."

Under the "liberal construction rule" articulated first in *Federal Housing Administration v. Burr,* 309 U.S. 242 (1940), "sue and be sued" agencies may be liable for prejudgment interest as a normal incident of suit. *See* Brief of Petitioner at 10 n.5. Yet the Postal Service contends that its general authority to "sue and be sued" is somehow delimited by the language of Section 717 of the 1972 amendments to Title VII and therefore,

the Postal Service is not liable for prejudgment interest in the same way a private enterprise would be. The reasoning of the Postal Service is that since all federal agencies are subject to the same administrative and judicial scheme for processing charges under Title VII, all federal agencies, regardless of "sue and be sued status" are immune from interest awards incidental to back pay awarded under Title VII. This leap of logic falls short of its mark.

First, there is no express language in Title VII or the legislative history of the 1972 amendments, delimiting the authority of "sue and be sued" clauses in the charters of certain federal agencies. Had Congress intended to delimit the scope of the status waiver of immunity effected by the Postal Service's "sue and be sued" clause, it would have so stated in the language of Section 717 or elsewhere in Title VII. This is precisely what Congress did in another substantive waiver, the Federal Tort Claims Act:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under Section 1346(b) of this title, *and the remedies provided by this title in such cases shall be exclusive.*

28 U.S.C. 2679(a) (emphasis added). In Section 2679(a), Congress expressly recognized that a "sue and be sued" clause is a *separate* source of authority, apart from the substantive waiver statute itself, not only for certain types of suit but also for *certain types of remedies.* Against the backdrop of the "liberal construction rule" regarding the scope of the waiver of immunity effected by "sue and be sued" clauses, Congress acknowledges the separate authority and status of sue and be sued agencies and clarifies the exclusivity of the Federal Tort Claims Act remedies vis-a-vis these agencies. Yet there is no parallel language in Title VII. Given the long-standing and continued viability of the "liberal construction rule," it is

reasonable to conclude that had Congress intended to delimit the general authority of the "sue and be sued" clause in the Postal Service charter or that of other such agencies, Congress would have placed in the 1972 amendments to Title VII language similar to that expressed in the Federal Tort Claims Act. Congress' silence in Title VII regarding the issue of prejudgment interest is not surprising given the "historical view that interest is an element of damages separate from damages on the substantive claim." *Library of Congress v. Shaw,* 106 S.Ct. 2957, 2961 (1986) (quoting C. McCormick, Damages Sec. 50, p. 205 (1935)). Yet, Congress' silence in Title VII regarding "sue and be sued" agencies is more instructive given Congress' experience in legislating against a backdrop of the well-settled "liberal construction rule."

Second, if the language of Section 717 requires this Court to apply the no-interest rule indiscriminately to all federal agencies, regardless of "sue and be sued" status, then this Court's recent acknowledgement in the Title VII decision of *Library of Congress v. Shaw,* of the inapplicability of the no-interest rule to certain federal agencies seems superfluous:

> The no-interest rule is similarly inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.

Library of Congress v. Shaw, 106 S.Ct. 2957, 2963, n.5 (1986) (citation omitted). Under the Postal Service's analysis, there is *no* federal agency under Title VII which does not enjoy the benefit of the "no interest rule." The Postal Service's analysis is impossible to reconcile with footnote 5 of the *Shaw* opinion.

II. An Award Of Prejudgment Interest Against The Postal Service Would Not Be "Inconsistent With The Statutory Scheme."

The Postal Service acknowledges the viability of the "liberal construction rule" articulated by the Supreme Court in inter-

preting the scope of "sue and be sued" clauses in the charters of federal agencies. *See* Brief for the Respondent at 17. The Postal Service concedes that as a "sue and be sued agency" engaged in commercial enterprise, its liabilities are presumed to be the same as that of a private enterprise. *See id*; *Franchise Tax Board v. United States Postal Service,* 467 U.S. 512, 519 (1984). At the same time, however, the Postal Service seeks to overcome this presumption of equivalent liability by fitting itself within one or more exceptions to the liberal construction rule articulated by the Supreme Court in *Federal Housing Administration v. Burr*:

> Rather, if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commerical world and endowed it with authority to "sue and be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

309 U.S. 242, 245.

First, the Postal Service argues that prejudgment interest is not consistent with "the statutory or constitutional scheme." The Postal Service then characterizes the relevant "statutory scheme" as Section 717, Title VII. Clearly, however, the statutory scheme contemplated by the Court in *Federal Housing Administration v. Burr* was the series of related "sue and be sued" statutes enacted by Congress during the New Deal era. Even afterwards, Congress continued to charter new "sue and

be sued agencies." The Court discussed this statutory scheme in the first of a trilogy of cases, *Kiefer and Kiefer v. Reconstruction Finance Corp.,* 306 U.S. 516, 518 (1939). In its discussion of the scope of the waiver of immunity Comgress effected for the Regional Agricultural Credit Corporation, the Court states as follows:

> It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have an consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsiblities of Regional, *but in a series of statutes* utilizing corporations for governmental purposes and drawing significance from dominant, contemporaneous opinion regarding the immunity of governmental agencies from suit.

Id. (emphasis added).

Justice Frankfurter's mode of analysis was to look at the scheme of status waiver statutes as an aid to interpreting the scope of the waiver effected by a particular sue and be sued clause. If the definition of the scope of that waiver is somehow inconsistent with the series of sue and be sued status waiver statutes, then the waiver has been improperly delimited or expanded. In this case, however, the Postal Service characterizes Section 717 as the "statutory scheme" to look to for aid in intepreting the scope of the waiver defined by the Postal Services' charter. This is an improper mode of analysis and certainly not the method contemplated by the Supreme Court in the trilogy of status waiver decisions. It is the policy behind the scheme of these status waiver statutes which serves as a guide for interpretation, not the policy behind the administrative enforcement scheme of Section 717.

Naturally, if Congress had spoken to either the issue of interest or "sue and be sued" agencies in Title VII, then the Court would have some express indication of Congress' intent regarding the interplay of the enabling statutes of sue and be sued agencies and Section 717. No such language appears, however, in Title VII. Therefore, it stretches logic to assert that Congress even contemplated any interplay between these two statutes, regarding immunity of the Postal Service.

The Postal Service in its Brief also suggests that imposing prejudgment interest under Title VII would gravely interfere with its governmental function — another exception to the liberal construction rule articulated by the Supreme Court in *Federal Housing Administration v. Burr*. *See* Brief for the Respondent at 18 n.9. The Postal Service argues that the language of Section 717 indicates that Congress "viewed the relationship between the Postal Service and its employees to have a governmental, rather than a private and commercial nature." *Id.* The Postal Service's argument seriously distorts the distinctions the lower federal courts have drawn between proprietary and governmental functions when discussing the scope of a status waiver. This distinction is sometimes drawn to show that it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. For example, with respect to the Federal Deposit Insurance Corporation, the lower courts have recognized that Congress intended the "sue and be sued" clause in its charter to be narrowly construed with respect to certain of its governmental, as opposed to proprietary functions.[1] The ra-

[1] *See, e.g. Philadelphia Gear Corp. v. Federal Deposit Insurance Corp.*, 752 F.2d 1131 (10th Cir. 1984) (court refused to allow the award of prejudgment interest against the FDIC acting in its capacity as an insurer for delays in paying insurance claims, since Congress had expressly recognized such delays would occur and thereby did not waive FDIC's immunity to prejudgment interest).

tionale for drawing this distinction is that in certain limited situations, the "sue and be sued" agency is exempt from liability arising out of the exercise of certain wholly governmental functions where the agency acts solely as the government's agent and where the United States itself would not be liable. *See, e.g. Queen v. Tennessee Valley Authority,* 689 F.2d 80, 86 (6th Cir. 1982). As previously stated in Petitioner's Brief, the lower federal courts have not noted such a distinction in the legislative history of the Postal Reorganization Act or in the Act itself. The Postal Service asserts that as an employer, it is engaging in a governmental and not a commercial function. This mode of analysis splits the identity of the Postal Service for various purposes but does not look to the basic function of the agency as a *commerical* one, providing services to the public. The Postal Service is clearly engaged in commercial enterprise. Its internal operations and its employer-employee relationships are ancillary to its overall identity as a private like agency which has been launched by Congress into the commerical world. Again, neither the enabling statute nor the legislative history of the Postal Reorganization Act or Section 717 contains language indicating a plain intent of Congress to use the Postal Service's "sue and be sued" clause in a narrow sense. Consequently, none of the exceptions to the liberal construction rule can logically be applied here. Any attempt to do so would be basing inferences upon inferences and not upon the express language or legislative history of Title VII or the Postal Reorganization Act.

CONCLUSION

Accordingly, for all of the above reasons, Petitioner prays this Honorable Court to reverse the decision of the Court of Appeals and to remand this case to the trial court for an award of prejudgment interest in an amount to be determined by the trial court.

Respectfully submitted,

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Dated: December 28, 1987

AMICUS CURIAE

BRIEF

No. 86-1431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THEODORE J. LOEFFLER,

Petitioner,

vs.

PRESTON R. TISCH, Postmaster General of the United States,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the United States Postal Service, created by an act of Congress in 1970 and therein authorized "to sue and be sued," 39 U.S.C. 401(1), is immunized against an award of pre-judgment interest in a suit brought pursuant to the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e, et seq.

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Interest of Amicus Curiae[1]

The NAACP Legal Defense and

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[1]Letters consenting to the filing of this Brief on behalf of the petitioner and the respondent are on file with the Clerk of Court.

Educational Fund, Inc. is a non-profit corporation that was established for the purpose of assisting black citizens in securing their constitutional and civil rights. Its attorneys have represented parties and participated as amicus curiae in numerous cases before this Court involving various facets of the law.

The Legal Defense Fund has a particular interest in the question before the Court in the present case because of its representation of employees of the United States Postal Service in a number of actions brought under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); Chisholm v. United States Postal Service,

665 F.2d 482 (4th Cir. 1981); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985). The last of these cases is yet to be resolved, and the right of the members of the plaintiff class to be fully compensated for denials of promotions that allegedly violated Title VII will be resolved by the decision in the present case.

Summary of Argument

I.

For many years "sue and be sued" clauses have been broadly interpreted by this Court to effect general waivers of sovereign immunity. Thus, as long ago as 1913 the Court held that pre-judgment interest could be awarded against a federally-chartered corporation closely analogous to the Postal Service. The lower courts have similarly permitted

such awards against a number of the many corporations and agencies whose authorizing statutes include a "sue and be sued" clause.

II.

When it passed the Postal Service Reorganization Act, Congress clearly intended Postal Service employees to be treated, with a few exceptions, like employees in private firms. Thus, they do not come within the civil service system under Title 5 of the United States Code and they come under the auspices of the National Labor Relations Board. Therefore, to disallow such employees pre-judgment interest on back pay awards would place them in a disfavored position vis-a-vis other employees.

III.

When Congress included the Postal

Service under Section 717 of the Equal Employment Opportunity Act of 1972 it did not intend to diminish the rights of Postal Service employees to be treated as employees in the private sector. In 1970, Congress only intended that Postal Service employees have the benefit of what were then perceived to be the superior procedures for administrative resolution of EEO complaints afforded by the Civil Service Commission.

ARGUMENT

Introduction

The United States Postal Service was created out of the old Postal Department by the Postal Reorganization Act of 1970, with the intention of creating efficient and economical mail service.[2] This was

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[2] H.R. Rep. No. 1104, 91st Cong., 2d Sess., (1970) reprinted in 1970 U.S. Code Cong. & Admin. News 3649, 3650. Hereinafter House Report.

accomplished in several ways, including making the Postal Service independent of politics[3] and the restructuring of the organization in a more business-like manner.[4] One important aspect of the new Postal Service is that it is to be financially independent of the federal government.[5] House Report, at 3659.

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[3] Id.; 39 U.S.C. § 1002 (1980).

[4] For example, the management of the Post Office was reorganized to be more business-like. House Report, at 3660; 39 U.S.C. §§ 1001(c), 1004. Executives, although not politically appointed, cannot be included in a collective bargaining unit. 39 U.S.C. § 1202(1).

[5] If the funds from a suit would be taken from the United States Treasury, then sovereign immunity usually applies. But see National Home for Disabled Volunteer Soldiers v. Parrish, 229 U.S. 494 (1913). But where an organization has been empowered to sue and be sued, and the judgment is paid out of the organization's own funds, then sovereign immunity may not be a bar. Kennedy Elec. Co., Inc. v. United States Postal Service, 508 F.2d 954 (10th Cir. 1974).

This extends to any "judgment against the Government of the United States arising out of activities of the Postal Service" since it must be "paid by the Postal Service out of any funds available to the Postal Service." 39 U.S.C. 409(e).

As much as the Congress wished the Postal Service to be business-like and independent of the government, it could not be entirely freed from its previous role because of the importance of mail delivery in the United States. For this reason the prohibition against strikes was applied to Postal employees,[6] and the federal government subsidizes the Postal Service to the extent that it is mandated to operate inefficient Post Offices. 39 U.S.C. § 2401(b)(1).

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[6] House Report, at 3662.

I.

"SUE AND BE SUED" CLAUSES RAISE A STRONG PRESUMPTION OF WAIVER OF SOVEREIGN IMMUNITY

The words "sue and be sued" do not have a magical meaning since Congress can situate a federal entity into the private marketplace such that sovereign immunity is waived even though the organization lacks a "sue and be sued" clause. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939). However, Congress's selective use of the clause has created a family of organizations which are primarily private in nature. When Congress placed the Postal Service within this family in 1970, it intended the Service to be treated like other private organizations.

The phrase "sue and be sued" is

found 124 times in the U.S. Code Annotated, and a review of these statutes indicates that these organizations were meant to be on the same footing as their private sector counterparts. The largest category of these statutes are those creating Patriotic Societies in Title 36 of the U.S. Code.[7] These societies are considered private corporations established under federal law. 36 U.S.C. § 1101. Although these corporations must submit reports to Congress,[8] and many are

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[7] In addition to the statutes listed in footnotes 8-11, see 36 U.S.C. § 2 (American National Red Cross); 36 U.S.C. § 20c (Sons of the American Revolution); 36 U.S.C. § 22 (Boy Scouts of America); 36 U.S.C. § 32 (Girl Scouts of America); 36 U.S.C. § 57b (Marine Corps League); 36 U.S.C. § 63 (Belleau Wood Memorial Association); 36 U.S.C. § 114 (Veterans of Foreign Wars); 36 U.S.C. § 140b(c) (Service Clubs); 36 U.S.C. § 205(a) (Civil Air Patrol); 36 U.S.C. 314(j) (Military Chaplains Association).

[8] 36 U.S.C. § 1103 (1980).

tax-exempt,[9] they are able to choose employees as they require,[10] they are non-political, and they are liable for

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[9] 36 U.S.C. § 96 (American War Mothers); 36 U.S.C. § 1219 (United States Capitol Historical Society); 36 U.S.C. § 3614 (Pearl Harbor Survivors Association); and see generally, 26 U.S.C. § 501(c)(4).

[10] 36 U.S.C. § 78c(4) (Ladies of the Grand Army of the Republic); 36 U.S.C. § 274(3) (Future Farmers of America); 36 U.S.C. § 434(3) (National Conference on Citizenship); 36 U.S.C. § 464(3) (National Safety Council); 36 U.S.C. § 504(3) (Board for Fundamental Education); 36 U.S.C. § 534(4) (Sons of Union Veterans); 36 U.S.C. § 604(4) (National Fund for Medical Education); 36 U.S.C. § 664(3) (National Music Council); 36 U.S.C. § 694(4) (Boys' Clubs of America); 36 U.S.C. § 764(4) (Veterans of World War I of the United States of America); 36 U.S.C. § 884(4) (Big Brothers--Big Sisters of America); 36 U.S.C. § 944(4) (Blue Star Mothers); 36 U.S.C. § 974(4) (Agricultural Hall of Fame); 36 U.S.C. § 1044(4) (Naval Sea Cadets); 36 U.S.C. § 1074(3) (Little League Baseball, Inc.); 36 U.S.C. § 3404(4) (American Symphony Orchestra League).

the actions of their officers.[11] On the

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[11] 36 U.S.C. § 46 (American Legion); 36 U.S.C. § 67j (AMVETS); 36 U.S.C. §§ 78i, 78j (Ladies of the Grand Army of the Republic); 36 U.S.C. § 86 (United States Blind Veterans of World War I); 36 U.S.C. § 90f (Disabled Army Veterans); 36 U.S.C. § 98 (American War Mothers); 36 U.S.C. §§ 230, 232 (Reserve Officers Association); 36 U.S.C. §§ 280, 281 (Future Farmers of America); 36 U.S.C. §§ 342, 346 (American Society of International Law); 36 U.S.C. § 376 (United States Olympic Committee); 36 U.S.C. § 411 (Conference of State Societies, Washington, D.C.); 36 U.S.C. §§ 440, 441 (National Conference on Citizenship); 36 U.S.C. §§ 471, 472 (National Safety Council); 36 U.S.C. §§ 510, 511 (Board for Fundamental Education); 36 U.S.C. §§ 541, 542 (Sons of Union Veterans); 36 U.S.C. §§ 580, 581 (Foundation of the Federal Bar Association); 36 U.S.C. §§ 640, 641 (Legion of Valor); 36 U.S.C. §§ 670, 671 (National Music Council); 36 U.S.C. §§ 700, 701 (Boys' Clubs of America); 36 U.S.C. §§ 771, 772 (Veterans of World War I); 36 U.S.C. §§ 800, 801 (Congressional Medal of Honor Society); 36 U.S.C. §§ 830, 831 (Military Order of the Purple Heart); 36 U.S.C. §§ 860, 861 (Blinded Veterans Association); 36 U.S.C. §§ 890, 891 (Big Brothers--Big Sisters of America); 36 U.S.C. §§ 919, 920 (Jewish War Veterans); 36 U.S.C. §§ 950, 951 (Blue Star Mothers); 36 U.S.C. §§ 980, 981 (Agricultural Hall of Fame); 36

whole, these patriotic societies are not considered a part of the government. In Stearns v. Veterans of Foreign Wars, 394 F.Supp. 138 (D.D.C. 1975), for example, the court held that a discriminatory membership policy does not implicate state action although Congress created the VFW and its membership requirements.

The next largest group of statutes concern banks, insurance, loans,

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U.S.C. §§ 1011, 1012 (National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic); 36 U.S.C. §§ 1050, 1051 (Naval Sea Cadets); 36 U.S.C. §§ 1080, 1081 (Little League Baseball, Inc.); 36 U.S.C. §§ 1156, 1165 (Paralyzed Veterans of America); 36 U.S.C. § 1210 (United States Capitol Historical Society); 36 U.S.C. § 1304 (United Service Organizations); 36 U.S.C. § 3304 (American National Theater and Academy); 36 U.S.C. §§ 3410, 3411 (American Symphony Orchestra League); 36 U.S.C. §§ 3608(d), 3609 (Pearl Harbor Survivors Association).

investments, and receivers.[12] In

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[12] Rural Telephone Bank, 7 U.S.C. § 942; Federal Crop Insurance Corporation, 7 U.S.C. § 1506; bankruptcy trustees, 11 U.S.C. § 323(b); national banks, 12 U.S.C. § 24(4); receivers of national banks, 12 U.S.C. § 197(b); Federal Reserve Banks, 12 U.S.C. § 341(4); corporations which do international or foreign banking, 12 U.S.C. § 614; Export-Import Bank of Washington, 12 U.S.C. § 635(a)(1); Federal Home Loan Banks, 12 U.S.C. § 1432(a); Federal Home Loan Mortgage Corporation, 12 U.S.C. § 1452(b)(7); Housing and Urban Development, 12 U.S.C. § 1702; Government National Mortgage Association and Federal National Mortgage Association, 12 U.S.C. § 1723a(a); Federal Savings and Loan Insurance Corporation, 12 U.S.C. § 1725(c)(4); federally chartered credit unions, 12 U.S.C. § 1757(2); National Credit Union Administration Board, 12 U.S.C. §§ 1766(b)(3), 1789(a)(2), 1795f; Federal Deposit Insurance Corporation, 12 U.S.C. § 1819(4); Federal Land Bank, 12 U.S.C. § 2012(4); federal land bank associations, 12 U.S.C. § 2033(4); Federal Intermediate Credit Banks, 12 U.S.C. § 2072; Production Credit Associations, 12 U.S.C. § 2093(4); banks for cooperatives, 12 U.S.C. § 2122(4); Farm Credit System Capital Corporation, 12 U.S.C. § 2216f(a)(7); Farm Credit Administration, 12 U.S.C. § 2252(a)(13); Federal Financing Bank, 12 U.S.C. § 2289(1); National Consumer Cooperative Bank, 12 U.S.C. § 3012(6); Securities

Investor Protection Corporation, 15 U.S.C. § 78ccc(b)(1); Small Business Administration, 15 U.S.C. § 634(b)(1); Commodity Credit Corporation, 15 U.S.C. § 714b(c); Secretary of Commerce (loans to private firms), 19 U.S.C. § 2350; Secretary of Education (student loans), 20 U.S.C. § 1082(a)(2); Student Loan Marketing Association, 20 U.S.C. § 1087-2(i)(1); Secretary of Education (loans for building educational facilities), §§ 20 U.S.C. § 1132d-1(b)(2), 1132g-1(c)(2); Overseas Private Investment Corporation, 22 U.S.C. § 2199(d); Secretary of the Interior (loans to Indian organizations), 25 U.S.C. § 1496(a); property receivers in different district courts, 28 U.S.C. § 754; ERISA benefit plans, 29 U.S.C. § 1132(d)(1); Pension Benefit Guarantee Corporation, 29 U.S.C. § 1302(b)(1); Deep Water Liability Fund, 33 U.S.C. § 1517(f)(1); VA Administrator (home loans), 38 U.S.C. § 1820(a)(1); Secretary of HHS (loans to graduate students in the health professions), 42 U.S.C. § 294h(a)(2); United States Housing Authority, 42 U.S.C. § 1404a; Secretary of HHS (urban renewal loans), 42 U.S.C. § 1456(c)(1); Secretary of HHS (public works loans), 42 U.S.C. § 3211(11); Neighborhood Reinvestment Corporation, 42 U.S.C. § 8105(b)(4); United States Synthetic Fuels Corporation, 42 U.S.C. § 8771(a)(4); Trans Alaska Pipeline Fund, 43 U.S.C. § 1653(c)(4); Offshore Oil Pollution Compensation Fund, 43 U.S.C. § 1812(a);

general, these organizations are proprietary, and are meant to be as liable as their private counterparts. See e.g. Standard Oil Co. v. United States, 269 U.S. 76 (1925). In terms of employment policy, most of these organizations fall outside of the Civil Service system,[13] such that the employees

Fishermen's Contingency Fund, 43 U.S.C. § 1842(a)(4); Railroad Rehabilitation and Improvement Fund, 45 U.S.C. § 822(c)(5).

[13] Within the statutory framework of an organization, the Code does not always specify the status of its employees. The status has been specified in the following organizations.

Not in Civil Service: Federal Reserve Banks, 12 U.S.C. § 341(5); Federal Home Loan Banks, 12 U.S.C. § 1439; Federal Home Loan Mortgage Corporation, McCauley v. Thygerson, 732 F.2d 978 (D.C. Cir. 1984); FSLIC, 12 U.S.C. § 1725(c)(5); FDIC, 12 U.S.C. § 1819(5); Federal Intermediate Credit Banks, 12 U.S.C. § 2072(15); Production Credit Associations, 12 U.S.C. § 2093(17); Farm Credit System Capital Corporation, 12 U.S.C. §§ 2216f(a)(3), 2216f(c); Federal Financing Bank, 12 U.S.C. § 2289(8); National Consumer

are treated like employees in the private sector.

The remainder of the "sue and be sued" statutes contain a variety of organizations, some more private than others. Many of these are meant to encourage or organize a specific activity,[14] some concern governments,[15]

Cooperative Bank, 12 U.S.C. § 3012(3); Securities Investor Protection Corporation, 15 U.S.C. § 78ccc(b)(7); Neighborhood Reinvestment Corporation, 42 U.S.C. § 8104(a).

Mixed Civil Service: Government National Mortgage Association and Federal National Mortgage Association, 12 U.S.C. §§ 1723a(d)(1), (d)(2); Pension Benefit Guarantee Corporation, 29 U.S.C. § 1302(b)(6).

Within Civil Service: Federal Crop Insurance Corporation, 7 U.S.C. § 1507(a); National Credit Union Administration Central Liquidity Facility, 12 U.S.C. § 1795f(a)(2); Small Business Administration, 15 U.S.C. § 634(a); Commodity Credit Corporation, 15 U.S.C. § 714h.

[14] Corporation of Foreign Security Holders, 15 U.S.C. § 77dd; China Trade Act corporations, 15 U.S.C. §§ 146(c),

and others deal with services that could be provided by private companies.[16]

156; Textile Foundation, 15 U.S.C. § 504(b); National Park Foundation, 16 U.S.C. § 19i; National Trust for Historic Preservation in the United States, 16 U.S.C. § 468(c)(b); Roosevelt Campobello International Park Commission, 16 U.S.C. § 1103(c); National Fish and Wildlife Foundation, 16 U.S.C. § 3703(c)(5); Institute of American Indian and Alaska Native Culture and Arts Development, 20 U.S.C. § 4414(3); National Trust for Drug Free Youth, 20 U.S.C. § 4665(d)(3); Inter-American Foundation, 22 U.S.C. § 290f(e)(10); African Development Foundation, 22 U.S.C. § 290h-4(a)(2); United States Institute of Peace, 22 U.S.C. § 4604(j); Saint Lawrence Seaway Development Corporation, 33 U.S.C. § 984(a)(3); Pennsylvania Avenue Development Corporation, 40 U.S.C. § 875(4).

[15] Taiwan, 22 U.S.C. § 3303(b)(7); Puerto Rico, 48 U.S.C. § 733.

[16] Tennessee Valley Authority, 16 U.S.C. § 831c(b); United States Postal Service, 39 U.S.C. § 401(1).

There is a final group of statutes that are not readily classifiable. Gallaudet University, 20 U.S.C. § 4302(a); Indian cooperative associations in Oklahoma, 25 U.S.C. § 505; settlement agreement between Maine and Passamaquoddy Tribe, Penobscott Nation, and Houlton

Although each of these organizations pursue a governmental objective, none of them compare with other federal agencies. These organizations are not rule-making in nature, and where the organization has its own employees, they are most likely not within the Civil Service System.[17]

Band of Maliseet Indians, 25 U.S.C. § 1725(d)(1); Federal Tort Claims Act, 28 U.S.C. § 2679; labor unions, 29 U.S.C. § 185(b); unions of the USPS, 39 U.S.C. § 1208(e).

[17] Not in Civil Service: Corporation of Foreign Security Holders, 15 U.S.C. § 77dd; Roosevelt Campobello International Park Commission, 16 U.S.C. § 1103(d); National Fish and Wildlife Foundation, 16 U.S.C. § 3702(g)(2)(a); Gallaudet University, 20 U.S.C. § 4303(b)(4); Institute of American Indian and Alaska Native Culture and Arts Development, 20 U.S.C. § 4416(a); National Trust for Drug Free Youth, 20 U.S.C. § 4465(d)(7); Inter-American Foundation, 22 U.S.C. § 290f(e)(5); African Development Foundation, 22 U.S.C.

Congress has used the "sue and be sued" clause over many years, in circumstances where the organization has been meant to act and be treated like other private organizations. By charging the Postal Service with the power to "sue and be sued," Congress included the Postal Service in the family of private-like organizations, and intended it to be subject to the same liability as private employers.

Recognizing this, the courts have construed "sue and be sued" waivers of

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§ 290h-4(a)(7).

Mixed Civil Service: Tennessee Valley Authority, 16 U.S.C. § 831b; United States Postal Service (a full discussion follows in Part II).

Within Civil Service: United States Institute of Peace, 22 U.S.C. § 4606(b); Saint Lawrence Seaway Development Corporation, 33 U.S.C. § 984(a)(7).

sovereign immunity broadly. In Federal Housing Administration v. Burr, 309 U.S. 242 (1940), the Supreme Court stated:

> [W]e start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned.... Hence, when Congress established such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In

> the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue and be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

309 U.S. at 245. Moreover, the waiver of Postal Service immunity is even broader than that found in Burr.

> In passing the Postal Reorganization Act of 1970, 84 Stat 719, Congress not only indicated that the Postal Service could "sue and be sued," 39 USC § 401(1), but also that it had the power "to settle and compromise claims by or against it," § 401(8), and that "[t]he provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service." § 409(c). Neither of these provisions would have been necessary had Congress intended to preserve sovereign immunity with respect to the Postal Service.

Franchise Tax Board v. United States Postal Service, 467 U.S. 512, 519 (1984).

The broad waiver effected by a "sue

and be sued" clause was held as long ago as 1913 to permit an award of pre-judgment interest against a federally-chartered corporation carrying out government related functions. National Home for Disabled Volunteer Soldiers v. Parrish, 229 U.S. 494 (1913). Thus, lower courts have upheld awards of pre-judgment interest against a number of federally created organizations with the power to sue and be sued. The Postal Service and the Tennessee Valley Authority are the two agencies against whom Title VII plaintiffs have been awarded pre-judgment interest. See Nagy v. United States Postal Service, 773 F.2d 1190 (11th Cir. 1985) and Milner v. Bolger, 546 F.Supp 375 (E.D.Cal. 1982); Eastland v. Tennessee Valley Authority, 35 E.P.D. ¶ 34,713, and generally, Queen

v. Tennessee Valley Authority, 689 F.2d 80 (6th Cir. 1982).[18] In non-Title VII actions, pre-judgment interest has been awarded against the Federal Crop Insurance Corporation,[19] the Commodity Credit Corporation,[20] the Federal Savings

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[18] By a sharply divided court, the 8th Circuit has reached the opposite conclusion. Cross v. United States Postal Service, 733 F.2d 1327 (8th Cir. 1984) (aff'd en banc by an equally divided court); Loeffler v. Tisch, 806 F.2d 817 (8th Cir. 1986) (en banc, decided 6-5).

[19] FCIC v. DeCell, 76 So.2d 826 (S.Ct. Miss. 1955) (pre-judgment interest allowed on insurance claim when the FCIC refused to cover 1947 crop damage); but, R & R Farm Enterprises v. FCIC, 788 F.2d 1148 (5th Cir. 1986) (pre- and post-judgment interest immunity not waived since FCIC is a non commercial venture where FCIC refused to pay entire claim for allegedly lost crops).

[20] Asheville Mica Co. v. CCC, 239 F.Supp. 383 (S.D.N.Y. 1965) aff'd 360 F.2d 931 (2d Cir. 1966) (pre-judgment interest granted where CCC breached contract concerning imported mica and stockpiling).

and Loan Insurance Corporation,[21] the Department of Housing and Urban Development,[22] the Secretary of Education,[23] and the Veterans

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[21] North N.Y. Savings Bank v. FSLIC, 515 F2d 1355 (D.C. Cir. 1975) (pre-judgment interest granted on bank reserved held by FSLIC).

[22] Ferguson v. Union National Bank of Clarksburg, W.Va., 126 F.2d 753 (4th Cir. 1942) (interest allowed where Federal Housing Administrator, now Secretary of HUD, guaranteed loan to an industrial corporation); Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644 (5th Cir. 1980) ("sue and be sued" is a waiver of sovereign immunity for purposes of a contractor seeking payment for construction work on housing project insured by the Secretary under a program authorized by the National Housing Act); United States v. Parkside Court, Inc., 257 F.Supp. 177, 179 (D.N.J. 1966) aff'd 376 F.2d 853 (3d Cir. 1967) ("Congress, having launched its agency into the world of commerce, endowed it with both the right to sue and be sued as any other private enterprise").

[23] Citizens Savings Bank v. Bell, 605 F.Supp. 1033 (D.R.I. 1985) (lender is owed pre-judgment interest on guaranteed student loan).

Administration administrator.[24] The "sue and be sued" clause has also allowed interest against bank receivers,[25] labor unions,[26] and ERISA benefit plans,[27] all

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[24] New York Guardian Mortgage Corp. v. Cleland, 473 F.Supp. 422 (S.D.N.Y. 1979) (sovereign immunity not a bar to pre-judgment interest in regards to home loan guarantees); see also In re Townsend, 348 F.Supp. 1284 (W.D.Mo. 1972) ("sue and be sued" waives immunity so that a bankruptcy injunction prevents the VA from foreclosing on a lien.).

[25] McCarty v. Gault, 24 F.Supp. 977 (D.Or. 1938) (stockholder awarded pre- and post-judgment interest on his assessment from bank receiver).

[26] Airco Speer Carbon-Graphite v. Local 502, Int'l Union of Elec., Radio and Machine Workers of America, AFL-CIO, 479 F.Supp. 246 (W.D.Penn. 1979) (pre-judgment interest allowed where union breached no-strike clause of collective bargaining agreement entitling employer to damages); Eazor Exp. Inc. v. International Bro. of Teamsters, 520 F.2d 951 (3d Cir. 1975) cert. denied 424 U.S. 935 (1976) rehearing denied 425 U.S. 908 (1976) (in action for unauthorized strike, pre-judgment interest available when the damages are ascertainable with precision).

in cases where rights have been statutorily created.[28]

On the basis of Congress's inclusion of the Postal Service within the category of "sue and be sued" agencies, and the case law that developed both before and after the adoption of the Postal Reorganization Act, the Postal Service should be subject to pre-judgment interest.

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[27] Short v. Central States, Southeast & Southwest Areas Pension Fund, 729 F.2d 567 (8th Cir. 1984) (in order to make plaintiff whole, tractor owner-operator is entitled to pre-judgment interest from the time of the denial of his application); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981) cert. denied 454 U.S. 968 (1981) (pre-judgment interest is appropriate equitable relief to executives dismissed without cause).

[28] See 12 U.S.C.A. 197(b), 29 U.S.C.A. 185(b), 29 U.S.C.A. 1132(d)(1).

II.

CONGRESS INTENDED POSTAL SERVICE EMPLOYEES TO BE TREATED LIKE EMPLOYEES IN PRIVATE FIRMS

Unlike most other federal employees, the workers at the Postal Service are not within the usual civil service program; [29] rather, they are within the postal career service created by chapters 10 and 12 of Title 39 of the U.S. Code. These chapters place the postal employees within only a few procedures of the Civil Service, viz., adverse actions, preference eligibility, pay allowances based on living costs, compensation for work injuries, and retirement.

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[29] "Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title." 5 U.S.C.A. § 2105(e).

Everything else is subject to collective bargaining.[30]

In terms of compensation, Congress clearly intended that Postal Service employees have salaries competitive with the private sector. Among the policies of the reorganized postal system is that "As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States." 39 U.S.C. § 101 (1980). Pay encompasses more than an employee's salary; it also includes intangible benefits. This was recognized by Congress explicitly when it stated that "It shall be the policy of the Postal Service to maintain compensation and

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[30] See 39 U.S.C.A. § 1005 (1980).

benefits for all officers and employees on a standard of comparability to the compensation and benefits paid for comparable levels of work in the private sector of the economy." 39 U.S.C. § 1003 (1980) (emphasis added).

In addition to the benefits provided Postal employees, labor-management relations are also patterned on the private sector. The Postal Service is the only federal organization which falls under the auspices of the National Labor Relations Board, 39 U.S.C. § 1209(a), and for the purposes of labor-management reporting and disclosure procedures the Postal Service is specifically considered a private employer. 39 U.S.C. § 1209(b), 29 U.S.C. 402(e). Congress intended to "bring postal labor relations within the same structure that exists for nationwide

enterprises in the private sector." House Report, at 3662, quoted in Muday v. Cleaver, 590 F.Supp. 1209, 1210 (W.D.Mich. 1984).

One important component of an employee's working conditions is protection from discrimination. For individuals who feel that they may be subject to discrimination on account of race, sex, religion, or national origin, it would be natural for them to prefer companies with non-discriminatory policies and grievance procedures over other companies. While both private employers and the Postal Service are subject to Title VII,[31] the remedies available to aggrieved employees differ if Postal workers cannot obtain pre-

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[31] 42 U.S.C.A. §§ 2000e-2, 2000e-16(a).

judgment interest on back pay awards.[32] Thus disallowing pre-judgment interest to postal Service employees would result in a lower compensation package than is provided by the private sector of the economy.

III.

THE INCLUSION OF THE POSTAL SERVICE IN SECTION 717 DID NOT DIMINISH THE RIGHTS OF POSTAL EMPLOYEES

The main basis for the government's argument that Postal Service employees should be treated like other federal employees is that the Postal Service is included in Section 717 of Title VII along with other federal employees,

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[32] Pre-judgment interest awards are available against private employers. Taylor v. Phillips Industries, Inc., 593 F.2d 783 (7th Cir. 1979); Davis v. Jobs For Progress, Inc., 427 F.Supp. 479 (D.Ariz. 1976); Green v. United States Steel Corp., 640 F.Supp. 1521 (E.D.Pa. 1986).

rather than Section 701, which includes private employees. Contrary to the government's suggestion, this was not done to indicate that Postal Service employees are like other federal employees, rather, it simply reflects that the Postal Service was not previously under Title VII, and that the Title VII provisions were simultaneously made available to Postal employees and other federal employees.

A review of the legislative history of the Postal Reorganization Act clarifies that Postal workers are to have anti-discriminatory procedures at least as good as those provided the public sector. On June 30, 1970, Senator Cook introduced an amendment to the Postal Reorganization Act which would subject the Postal Service to the provisions of

Title VII. The amendment was quickly adopted by a 93-0 vote, 116 Cong. Rec. 22279-80 (1970), but the conference committee deleted the amendment. The floor manager, Senator McGee, explained to the Senate that the deletion

> was less a concession to the House and its insistence than it was to the persuasion of the conferees in consultation with the legal minds involved in the interpretation of the law and in consultation with the Chairman of the Civil Service Commission that, indeed, in this instance a very strong case was made that the equal rights provision would redound in more equal terms and more forceful terms under the Executive order that is now on the books than going through the EEOC.
>
> It war on that ground that the Senate conferees decided that because of the absence of similar language on the House side, we were really making a stronger case procedurally, because we were achieving the goals that the 93-to-0 vote spelled out on the Senate side.

116 Cong. Rec. 26956 (1970). In other words, the conferees adopted the Civil

Service Commission procedures since they believed those procedures were superior to those of the EEOC.[33] Indeed, Senator McGee stated that if this proves not to be the case, the Senate would take appropriate action.[34]

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[33] Representative Daniels explained: "Mr. Speaker, I would like to say to the distinguished chairman of our committee and to the gentleman from California that as a conferee I requested the Senate to reconsider its position [on Title VII]. The Senate reconsidered and receded and agreed to accept the House version which permits any charge or complaint of discrimination by virtue of age, sex, national origin and so forth to still be heard by the Civil Service Commission where as I pointed out the procedures with reference to the hearing of such complaints is much more adequate and affords much more protection to the person who is complaining." 116 Cong. Rec. 27597 (1970).

[34] "Mr. McGEE.... The conferees believe we will, indeed, achieve the laudable purpose that the Cook amendment intended. If it does not, if we discover that the conferees were proven to be wrong in their expectation and that the fears of the Senator from Kentucky [Cook] are warranted by subsequent decision or

Since the intent was to give Postal Service employees procedural protections as great or greater than those enjoyed by private employees, no intent to afford them inferior relief can be inferred from Congress' decisions in 1970 and 1972 to leave administrative enforcement in the hands of the Civil Service Commission.[35] it follows that sovereign immunity was waived as to pre-judgment interest.

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action, then I can guarantee to him that this body would proceed at once with the urging of members of the Committee on Post Office and Civil Service to legislate appropriately without delay. We believe it is not necessary. That is our judgment." 116 Cong. Rec. 26957 (1970).

[35] The fact that Congress later, in 1978, concluded that its confidence in the Civil Service Commission was misplaced and it acquiesced in the transfer of federal EEO authority to the Equal Employment Opportunity Commission can not be retroactively used to re-interpret its intent when it passed the Postal Reorganization Act in 1970. Cf. Brown v. GSA, 425 U.S. 820 (1976).

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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